No. 1

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC, ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

*Petitioners*,

—v.—

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether substantive due process is violated when a national power plant developer negotiates a $150 - $200 million dollar contribution to local programs, community organizations and constituencies designated by a cash-strapped suburban town, expressly in exchange for the Town's granting of environmental and zoning approvals to construct an oversized, regional electrical power plant in a local neighborhood where applicable zoning does not otherwise permit it.

II. Whether a Town Board's completely unlawful and *ultra vires* negotiation and acceptance of a $150 - $200 million dollar payment by a zoning applicant as a condition of environmental and zoning approvals violates the substantive due process rights of petitioners, who are nearby residents, Civic Associations, property owners and others accorded standing for purposes of the environmental review.

## LISTING OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to this appeal are those listed in the caption, as well as: Long Island Power Authority and Planning Board of the Town of Brookhaven.

The parents, subsidiaries and affiliates of Petitioner East End Property Company #1 LLC are:

Dune Capital Brookhaven LLC, a Delaware limited liability company
Dune Special Investments LP
East End Investors LLC, a Delaware limited liability company
East End Junior MB #1 LLC, a Delaware limited liability company
EE Springing Member I-C, Inc., a Delaware corporation
East End Senior MB #1 LLC, a Delaware limited liability company
East End Property Company #1 LLC, a Delaware limited liability company
EE Springing Member I-B, Inc., a Delaware corporation
EE Springing Member I-A, Inc., a Delaware corporation
Panco Management of New York LLC
PP East End Manager Corp., a Delaware corporation

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## OPINIONS BELOW

On May 22, 2007, the New York Supreme Court, Suffolk County granted in part and denied in part petitioner's petition seeking invalidation of Town Board approvals allowing construction of a large electric generation facility (Appendix 24a). The order required the Town Board to explain its reasons for changing its vote from disapproval of a required environmental finding, to approval. The same day, the same court issued a related order in a related proceeding, deeming the proceeding governed by the first order and otherwise denying the petition (Appendix 17a). After the Town Board purported to explain its change of vote, the Supreme Court, Suffolk County, issued a third order in a third proceeding involving the same parties, dated January 8, 2008, dismissing the petition (Appendix 72a). Timely appeals from each of the three orders were taken.

By order of the New York Appellate Division, Second Department, the three appeals were consolidated for purposes of oral argument and the Record on Appeal. On November 25, 2008, through three decisions and orders, the Appellate Division affirmed the dismissal of the petitions, and granted the Town Board and the applicant's cross-appeals reversing the lower court's May 22, 2007 ruling requiring the Town Board to provide an explanation for its change of vote (Appendix 3a; 11a; 14a). The New York Appellate Division's rulings subject to this appeal are published at 56 A.D.3d 773, 868 N.Y.S.2d 264; 56 A.D.3d 773, 867 N.Y.S.2d 685; and 56 A.D.3d 778, 867 N.Y.S.2d 686.[1]

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[1] The rulings subject to this appeal make reference to a prior "Nassau County Action". That prior action is published at

On February 24, 2009 the New York Court of Appeals denied, in one combined order, the timely application of petitioners seeking leave to appeal all three orders of the Appellate Division (Appendix 1a). This petition for a writ of certiorari pertaining to all three proceedings, is accordingly similarly combined by virtue of the New York Court of Appeals' single order thereon.

## JURISDICTION

The New York Court of Appeals denied petitioners leave to appeal on February 24, 2009 (Appendix 1a). This petition is therefore timely. The basis of jurisdiction is 28 U.S.C. § 1257, and Article III, § 2 of the U.S. Constitution.

## RELEVANT LAWS

U.S. CONST. AMEND., XIV, § 1

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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*East End Property Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

## STATEMENT OF THE CASE

Respondent Caithness Long Island, LLC ("Caithness"), a national power plant developer, approached a cash-strapped suburban town (respondent Brookhaven) offering to contribute at least $150 million (ultimately nearly $200 million) in direct exchange for obtaining the Town's permission to construct a vastly oversized, regional electrical power plant in an area of the Town where local zoning does not permit it. In direct exchange for contributing between $150 million - $200 million to various favored constituencies of the Town Board members who voted upon the approvals (a local community center for one Board Member's district, libraries, aid and scholarships to local school districts, and the like), Caithness obtained the Town's permission to construct a 350 megawatt, dual powered (gas and oil) electrical generating facility (the "Caithness Plant").

This permission was obtained notwithstanding that the Caithness Plant includes a 170 foot exhaust stack where only 120 feet is permitted, an 85 foot building height despite a 50 foot height limit (i.e., a structural volume some *3* times greater than local zoning permits), and a quasi-judicial adjudication was rendered by the Town Board members that the Caithness Plant would not have a significant adverse environmental or zoning impact upon other adjacent and local property owners and residents, but *only* upon the express "condition", set forth in the approvals themselves, that Caithness pay over $150 million into a town-wide "Community Benefits Package" consisting of local community centers, local school aid, scholarships, etc. having nothing whatsoever to do with the local environmental or zoning impacts of the Caithness Plant.

If that alone were not enough, the Town Board initially voted to *deny* approvals to Caithness. However, *after* Caithness "sweetened the pot" by several million additional dollars (including a $1 million community center in the local district of one Board Member who thereupon switched his vote from disapproval to approval), the Town Board promptly reversed itself and authorized construction of the Caithness Plant.[2]

The legal challenges to this abjectly unlawful and unconstitutional arrangement by Petitioner East End Property LLC ("East End"), which owns a nearby 795-unit residential rental community occupied by 2,000 persons known as "Atlantic Point", the resident manager of Atlantic Point, and two respected local Civic Associations and their officers (who are also nearby community residents) [collectively, "Petitioners"] were simply swept away by New York courts below which wrongly concluded that while Petitioners possess actual "standing" and injury-in-fact to object to the environmental review approvals, that standing and actual injury somehow do not extend to their objection to the illegal inducements giving rise to those determinations,

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[2] One Town Board Member conceded, on the *record*, that "*they [Caithness and LIPA] came to me and indicated to me what they were prepared to add to the package because of my unhappiness*", and that in response, he cynically bargained with Caithness to obtain "*more benefits . . . com[ing] to my district*" before *changing* his vote from one of *disapproval* on the first vote, to one of *approval* on the second (JR. 3516-3519). He was subsequently quoted in a local newspaper boasting to his constituents that "***I did not consider voting for Caithness until I got $1 million for Medford*** *[an area in his district]*".

and could also not challenge the special permit approvals themselves.[3]

No court (State or Federal) has ever sanctioned such a shockingly illegal arrangement and corruption of public processes in the complete absence of authority. To the contrary, every court (including other New York courts and the courts of numerous other States) which has considered the issue has rightly concluded that due process is violated when a wealthy developer is permitted, quite literally, to "purchase" otherwise unauthorized commercial development rights and municipal approvals in exchange for paying massive sums of money to the favored constituencies of local officials who are required to vote upon such development approvals and who have no authority to accept such payments.

If left to stand, the destructive precedent of the New York courts will invite corruption of local land use processes in a manner which the U.S. Constitution clearly forbids.

This petition for a writ of certiorari to review the New York courts' dismissal of Petitioners' claims should therefore be granted.

In New York, local municipalities possess no inherent zoning authority beyond that given them by the state legislature, and they possess no authority to negotiate with a zoning applicant for the payment of a sum of money to constituencies having nothing

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[3] The Final Environmental Impact Statement ("FEIS") for the Caithness Plant *specifically identified* the Atlantic Point residential community owned by East End Property Co. #1 as the "visual receptor" of the oversized 170 foot exhaust stack, depicting the proposed appearance of the 170 foot high exhaust stack directly from the gatehouse of Atlantic Point (JR. 529, 535, 541).

to do with the subject special permit application. *Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983). Additionally, whether the body is a zoning board or a town board (the town's legislature), a determination to grant a special permit is a quasi-judicial act.[4] Undeterred, the Town Board here acquiesced in the plot apparently initiated by the applicant Caithness, i.e. (i) that enormous sums of money would be given, (ii) the Town Board of a cash-starved suburban town would be able to fund popular local projects, and (iii) the special permit for an oversized, regional power plan would be approved.

When the Town Board initially considered the Caithness application for environmental and zoning approvals on June 6, 2006, a proposed Resolution to "condition" the approval upon Caithness' paying $150 million to constituencies designated by the Town Board members failed. By a vote of 4-3, the Town Board on June 6, 2006 refused to accept a "findings statement", mandated under New York's environmental review statute (SEQRA), certifying that the environmental impacts of the proposed oversized power plant had been mitigated to the maximum extent possible. But the illegal financial inducement negotiations continued, with the payment increased by the applicant, ultimately leading the Town Board to reverse itself a few weeks later on July 25, 2006, to approve the SEQRA findings

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[4] *Fleck v. Town of Colden*, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005) (Town Board deciding variance application acts as Zoning Board of Appeals and is subject to limitation imposed on ZBA); *Palm Management Corp. v. Goldstein*, 29 A.D.3d 801, 815 N.Y.S.2d 670 (2d Dept. 2006) (ZBA is a quasi-judicial administrative agency).

statement, and at the same time, approve the special permit. The special permit approval, however, specifically made the $150 - $200 million payment by the zoning applicant an express "condition" of the Town Board's approval.

Town Board Councilman Timothy Mazzei, the member who changed his vote between June 6th and July 25th, made clear on the record in a Town Board meeting during that period, that he was negotiating the amount of the payment with the applicant. His full statement on the record reads:

> "*I indicated very early on that one Council person, not six, negotiated this, this benefit package with LIPA [respondent Long Island Power Authority] and Caithness. That bothered me. It still bothers me.* I didn't think it was right. *When it was clear that you didn't have the votes, well, then all of a sudden, they became important because a vote was needed.* They came to me very professionally, very intelligently. I spoke with Ross [Ain] who is an extremely nice man, extremely intelligent man. He has explained everything very well to me. And, that with LIPA representatives, also very professional, very intelligent. And, I indicated to them that I wasn't going [to] negotiate. That was my exact words. *I said I wasn't happy. I felt that more benefits should have come to my district because . . . to do that and I'll listen and I'll take into consideration.*' But, I never said, '*I'm negotiating with you.*' *I never said, 'I want this, this, and the other thing'. They came to me and said, we're prepared to do*

> *additional things to try to satisfy you and I, and I listened to them.*" (see Transcript of June 15, 2006 Town Board work session at 40-42, exhibit YYY to Return in prior action) [emphasis supplied].

The Town's Supervisor (the Presiding member of the Town Board) also made clear on the record that the Town's approval was directly motivated by obtaining otherwise unavailable funds for popular community projects:

> "*Between the pilot [payment in lieu of taxes] payments between and community benefits package that was very ably negotiated by Councilwoman Kepert, Councilman Mazzei, Councilwoman Walsh and all the Town Board, we're able to do things with this particular power plant proposal that will enable communities who otherwise would never have been able to meet their public mission, whether it's the Village of Patchogue, the village of Bellport or this township or Brookhaven, whether it's the Boys & Girls Club Of North Bellport, whether it's the South Country School District. The list goes on and on as to how this is going to benefit a whole multitude of peoples, a whole multitude of public organizations. And this is the opportunity that, yes, we seek because it gives us the ability to do things what otherwise would not be done." (Appeal No. 3 Record 180-181).*"

The petitioners challenged the Town Board's (and the subsequent Town Planning Board's) resolution in

a state court proceeding. Because the same petitioners had, in a prior lawsuit, been found to live and own property in sufficiently close proximity to the proposed power plant to have "injury-in-fact",[5] petitioners were ruled to have "standing" to complain about the environmental impacts that the power plant would have on them (Appendix 45a; 51a-57a). Nevertheless, and for inexplicable logic or reason (other than to avoid having to confront the abject illegality of the large monetary payoff), the court ruled that notwithstanding petitioners' injury-in-fact environmentally, petitioners have no standing to object to the special permit (Appendix 43a-44a, 88a-89a[6]). The court further ruled that because the monetary inducement was a condition of the special permit, petitioners have no standing to object to the illegal payoff, even though the inducement led to, and was accepted at the same time as, the environmental and zoning approvals. The court so ruled,

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[5] The prior lawsuit is published at *East End Property Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

[6] SEQRA standing is no different than general zoning standing, and all zoning determinations must include and be made in consideration of environmental concerns (*Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 770 771, 570 N.Y.S.2d 778 (1991). In the prior lawsuit, which was given res judicata effect in this lawsuit (Appendix 45a), all the petitioners other than the Civic Associations were found to live or have property close enough to the proposed electric generation facility to have standing, and on appeal, the Appellate Division therein ruled that the Civic Associations too have such standing. *East End Property Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

even though the Town Board's change of its vote upon the environmental findings statement from against approving it on June 6th to approving it on July 15, 2006, was expressly conditioned upon increasing the sum of money to be paid.

## RULE 14(g)(i) STATEMENT

A substantive due process violation is stated upon a showing of an "arbitrary" deprivation of a liberty or property interest, if its arbitrariness is "egregious". *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 (2003). The petition below was premised on the Town Board's conduct in illegally accepting the payment of money as being blatantly "arbitrary" and "*ultra vires*" (Combined Petition and Complaint [first proceeding], ¶¶47, 50). The due process claims of Petitioners were included into the petition by incorporation (*id.*, ¶46 ["For reasons more fully detailed in the accompanying memorandum of law (incorporated herein), the changed Town Board vote violated, *inter alia*, . . . applicable procedures of the Town Board, and was otherwise the result of unlawful and impermissible 'contract zoning', and the Resolutions were without authority and jurisdiction were otherwise unlawful, arbitrary and capricious").

The incorporated accompanying memorandum of law argued extensively that the "change in vote was based upon such *ex parte* communications with Caithness and financial 'negotiations' with Caithness for increases in the Community Benefits Package. . . . It is beyond cavil that it is unlawful for the Town Board to accord any weight to those *ex parte* discussions, submissions and site visits in the votes

occurring after June 6, 2006, as this would directly deprive petitioners of their due process rights" (Petitioner's June 12, 2007 Memo of Law in Support of Petition, pp. 36-37 [additionally quoting caselaw holding " '[p]etitioner's due process rights were violated by the board's ex parte receipt and consideration' " of additional information and material).

Additionally, even when "inexplicit, . . . the due process issue [was] within the clear intendment of such contention and [ ] such issue [was] sufficiently presented." *Braniff Airways v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757 (1954).

## REASONS FOR GRANTING THE PETITION

By accepting the payment of $150 - $200 million as an inducement and express "condition" of its special permit approval, and by agreeing to the power plant applicant's offers to make the payoffs to whichever local programs, community groups, civic associations and Town constituencies the Town Board members decided to favor, the Town Board acted in a shockingly arbitrary manner, completely outside of its authority, without any statute or grant of power permitting it, and in the complete absence of standards and limitations on its bargaining. It thereby violated the substantive due process rights of petitioners. The substantive due process standard of review, looking to whether the conduct was arbitrary, and so "arbitrary" as to be "egregious" *(City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 [2003] [citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708 [1998]), while a necessarily difficult standard, is satisfied here. The Town

Board's conduct was "tainted with . . . fundamental procedural irregularity" such that it plainly rose from being merely arbitrary to being egregiously so. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007).

New Jersey courts (and even another New York appellate court)[7] have consistently recognized the egregious mischief, lawlessness, opportunity for abuse, and shocking unacceptability of a local zoning board, on an *ad hoc* basis and without any statute allowing for it or regulating its parameters, accepting and bargaining for a zoning permit applicant's payment of money or other consideration as an inducement. *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 194 N.J. 223, 944 A.2d 1 (N.J., 2008); *Township of Marlboro v. Planning Bd. of Tp. of Holmdel*, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995); *Nunziato v. Planning Bd. of Borough of Edgewater*, 225 N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988); *see* 187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007). At least one New York court, however, has determined that a supposed "payment in lieu of taxes" (PILOT) agreement with a municipal zoning entity having no jurisdiction or authority to enter such agreements, is manifestly unlawful and

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[7] See, *Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) invalidating the school districts grant of a tax exemption to Marriott Corporation conditioned upon the applicant making monetary payments to the district in the event casino gambling was legalized at the site, holding that "*a Legislature cannot bargain away or sell its powers*" (quoting *Church v. Town of Islip*, 8 N.Y.2d 254, 203 N.Y.S.2d 866 [1960]).

requires invalidation of the zoning approvals to which the payment led. *See also Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) (school district's resolution granting applicant tax exemption conditioned on applicant paying PILOT payment in the event casino gambling were legalized, was *ultra vires*).

In fact, in denouncing such arrangements as altogether unlawful, New Jersey courts in particular have aptly described them with the most abject contempt, clearly showing them to amount to "arbitrary" conduct egregious enough to constitute a substantive due process violation:

> [Such an] illegal exaction constitutes a blatant *quid pro quo* for the approval, either demanded by the municipality and acceded to by the developer or offered by the developer and accepted by the municipality in circumstances in which the exaction is unrelated to any legitimate land use concerns generated by the development application itself and the amount thereof is entirely arbitrary. If that is so, then the transaction may be fairly regarded as an interdicted sale of a municipal approval, subversive of law, anathematic to public policy, and remedial only by vitiation of the approval.

*Township of Marlboro v. Planning Bd. of Tp. of Holmdel*, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995).

And in an earlier case, the court in *Nunziato v. Planning Bd. of Borough of Edgewater*, 225

N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988), directly refused to accept a claim of an applicant who offered the money inducement, or of the municipal board members who accepted it, that their judgments were not corrupted by the payments such as to render them arbitrary and capricious. The New Jersey Appellate Division held that "[w]ithout legislated standards the possibilities for abuse in such negotiations between an applicant and a regulatory body, no matter how worthy the cause, are unlimited." It ruled that the "the kind of free-wheeling bidding under review is *grossly inimical* to the goals of sound land use regulation" and constitutes an "*intolerable spectacle* of a planning board haggling with an applicant over money [such as to] too strongly suggests that variances are up for sale."

Moreover, commentators have decried payoff arrangements made without a statutory framework or limitation, as being little more than an unlawful ad hoc bribe to the municipality made in exchange for zoning approvals. 187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007) (deriding such payoffs in exchange for permit approvals as "appalling"and altogether unlawful).

Just last year the New Jersey Supreme Court in *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 194 N.J. 223, 944 A.2d 1 (N.J., 2008), endorsed and approved the holdings of these cases deriding such quid pro quo agreements as unlawful.[8]

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[8] The New Jersey Supreme Court held that when the complaining party is the applicant who engaged in the negotiations and bargaining with the zoning board (as opposed to members of

The court explained:

> Indeed, it is hard to explain why a private developer would offer more than its fair share contribution without a quid pro quo. In addition to the problem of compulsion, so-called voluntary contributions are not much different than a pay-to-play system, where developers are rewarded for their philanthropic gifts. Allowing such a scheme not only impacts the developers willing to pay, but threatens the livelihood of those unable or unwilling to submit to the illicit exaction toll. Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission*, 22 Urb. Law. 23, 54-55 (1990) (Permitting these excess exactions would in effect allow sale of development rights to those who are able to pay the asking price. . . . It would be fair to assume that . . . [the] zeal to increase revenue would result in inattention to more appropriate planning concerns).

The appropriateness of this Court now confronting the abject illegality under the substantive Due Process Clause of a developer's large monetary inducement to a local zoning board in the complete absence of jurisdiction to negotiate or accept such

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the public aggrieved by the illegal wheeling and dealing, as in the *Township of Marlboro* and *Nunziato* cases which the court extensively cited and quoted), the bargain struck will not be binding and is subject to continual redress and renegotiation whenever a circumstance changes. The court held that if it were otherwise, and such an agreement were deemed an enforceable contract, having no relation to the supposed reasons upon which it was reached, the result would be abjectly illegal and abhorrent.

payoffs, is made clear by this Court's fairly recent holding in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005). There, this Court made clear that the proper constitutional framework for determining whether a zoning condition is sufficiently "related" to the zoning approval sought is not the Fifth Amendment Takings Clause, it is the Fourteenth Amendment's substantive Due Process Clause. Prior to *Lingle*, this Court in such cases as *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141 (1987), had directed that a condition of zoning and its "relation" to the permit sought should be analyzed under the Takings Clause, a rule which effectively foreclosed most land-use substantive due process claims—most particularly those, like here, asserted by a *contestant* of the zoning application who objected not that the exaction was too onerous but that the sum or exaction offered and given is an unconstitutional corruption of the resultant decision and an unfair influence.

After *Lingle*, several Circuit Courts of Appeal have ruled that land-use based substantive due process claims, asserting that determinations were egregiously arbitrary, are no longer excluded from federal review on the formerly held notion that only the Fifth Amendment provides a "textual source" for redress of such claims. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) (*Lingle* thus "pulls the rug out" from an argument that takings claims "preclud[e] substantive due process [property] claims based on arbitrary or unreasonable conduct"); *see also*, *A Helping Hand, LLC v. Baltimore County, MD*, 515 F.3d 356, 369 (4th Cir. 2008); *see additionally Rose Acre Farms, Inc. v. U.S.*, 559 F.3d 1260, 1277 (Fed.Cir. 2009).

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). "[T]he Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams* 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L.Ed. 232 [1884]) (internal citation omitted).

Bribery, or something close to it in the context of municipal decision-making, with large amounts of corrupting money flowing to the local municipality without the benefit of a state enabling legislation or even jurisdiction to negotiate or accept the sum, let alone defined guidelines equally applicable to all citizens and requiring that the money paid actually have a sufficient connection to the permit decision being made, is intolerable and abhorrent to substantive due process. As the New Jersey court in *Nunziato* poignantly held, this is so even when the local board members, and the applicant with whom they colluded for the negotiated money inducement, inevitably proclaim that the large dollar sums paid somehow did not invade their decision-making prerogative. *See also Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007) (zoning determination "tainted with . . . fundamental procedural irregularity" amounts to substantive due process deprivation); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir.1983) (members of a state barber licensing board denied the plaintiff due process in refusing a license to a potential competitor of one board member; "The regular and impartial administration of public rules governing [liberty and prop-

erty] interests, as required by due process, prohibits the subtle distortions or prejudice and bias" even where no class-based or other generalized invidious discrimination motivates the adverse treatment of a particular applicant).

## STANDING AND PROPERTY INTEREST

An immense (a fifteen acre "footprint" on a 95-acre site) regional power plant was proposed to be erected (and subsequently approved) in a local area. Local residents, civic groups, taxpayer associations, and the owner and residents of a nearby rental residential community promptly and timely objected that the power plant and its overly large (170 foot) exhaust stack, and its noxious emissions should not be allowed, particularly when the oversized exhaust stack (170 feet), viewable from their properties and plainly directly within reach of the noxious emissions, is not allowed in the applicable zoning district and required special variances. At every juncture, from the first proceeding and through the appeals herein, petitioners *were*, in fact, found to have been "injured-in-fact" by the Town Board's resolution and to have standing, at least in part, to petition for redress (Appendix 45a; 51a-57a).

The standing which the New York court acknowledged exists is based on New York's environmental review statute, that petitioners possess environmental injury different than others *and* live sufficiently close to the project area (Appendix 45a;[9]

[9] There, the court gave res judicata effect to the ruling in the prior action deeming petitioners to reside and own property close enough to the proposed power generation facility to be effected by its adverse environmental effects, *East End Prop-*

51a-57a). Yet, the petitioners' standing and interest in the matter and the manner in which it was resolved, i.e. corrupted by a $150 million - $200 million dollar payoff, was inexplicably deemed by the New York courts not to extend to challenging the inducements themselves, or to the special permit of which the inducements were an express condition (Appendix 43a-44a, 88a-89a). In addition, the New York courts below ignored the fact, continually pointed out by petitioners, that their acknowledged standing to challenge the environmental determinations and approvals plainly gave them standing to challenge the monetary inducement corrupting the environmental approvals given after those inducements were negotiated and accepted. In fact, the monetary inducement was accepted and was made an express "condition" of the special permit approval on the same day and at the same time that the environmental approvals were rendered by the same zoning body.

Petitioners possess Article III standing in this Court because they have injury-in-fact and were accorded standing and found to possess such injury-in-fact environmental standing by the New York courts. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037 (1989); *see Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 770-771, 570 N.Y.S.2d 778 (1991) (concluding that New York's environmental review law, the SEQRA statute, does not contain a special, more open grant of standing than is applicable to all other civil cases: "*SEQRA contains no provision regarding judicial review.*

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*erty Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

*In contrast, other states' environmental statutes explicitly grant standing to 'any person' or 'any citizen' to enforce its provisions. . . . In the absence of an answer in the statute, we turn to the case law on standing"* and apply the usual "*injury-in-fact*" and "*zone of interest*" test).

Petitioners' substantive property interests are similar: they have a property interest in their own real estate, and its environment, and a property interest under New York law as injured-in-fact entities and persons authorized to challenge the municipal resolutions. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972) (property interests are derived from, among other things, state law). Even before the corrupting effect of the already large monetary inducement was exacerbated by an even larger payment and a reallocation of the payment to the constituencies favored by one of the holdout Town Board members, the Town Board here voted on June 6, 2006 *against* approving the environmental SEQRA resolution, thereby giving petitioners a further claim of "entitlement".[10]

Review by this Court is fully warranted.

[10] With the "negotiations" over the sum of money to be paid by the applicant having continued over the ensuing weeks, and the sum increased, the Town Board reversed itself and on July 25, 2006 granted the environmental approval and the special permit.

## CONCLUSION

It is respectfully requested that this Court grant the petition.

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*Attorneys for Petitioners*

# APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of February, 2009*

Present, HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

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Mo. No. 33

IN THE MATTER OF EAST END PROPERTY COMPANY #1, LLC, *et al.*,

*Appellants*,

—v.—

TOWN BOARD OF TOWN OF BROOKHAVEN, *et al.*,

*Respondents*;

LONG ISLAND POWER AUTHORITY,

*Respondent.*

(And Two Other Proceedings.)

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A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/S/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

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Decided on November 25, 2008
2007-05041
(Index No. 23201/06)

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IN THE MATTER OF EAST END PROPERTY
COMPANY #1, LLC, *et al.*,

*respondents-appellants*,

—v—

TOWN BOARD OF TOWN OF BROOKHAVEN, *et al.*,

*appellants-respondents*;

LONG ISLAND POWER AUTHORITY,

*additional respondent*.

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Devitt Spellman Barrett, LLP, Smithtown, N.Y. (John M. Denby and Jeltje DeJong of counsel), for appellants-respondents Town Board of Town of Brookhaven and Town of Brookhaven. Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller and Richard Gabriele of counsel), and Beveridge & Diamond, New York, N.Y. (Stephen L. Gordon and Michael Murphy of counsel), for appellant-respondent Caithness Long Island, LLC (one brief filed).

Rosenberg Calica & Birney LLP, Garden City, N.Y. (Robert M. Calica and Judah Serfaty of counsel), for respondents-appellants.

Carter Ledyard & Milburn LLP, New York, N.Y. (Christine A. Fazio, Stephen L. Kass, and Christopher Rizzo of counsel), for additional respondent Long Island Power Authority.

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DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review two determinations of the Town Board of Town of Brookhaven, both dated July 25, 2006, which adopted a findings statement pursuant to the State Environmental Quality Review Act (ECL article 8) and granted the application of Caithness Long Island, LLC, for a special permit, waiver, and area variances regarding the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the Town Board of Town of Brookhaven and Town of Brookhaven appeal, and Caithness Long Island, LLC, separately appeals, as limited by their respective briefs, from

so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Spinner, J.), dated May 22, 2007, as granted those branches of the petition which were to annul the determinations on the grounds asserted in the fifth and sixth causes of action and to permanently enjoin the Town Board of Town of Brookhaven and Town of Brookhaven from approving the construction of the generator pursuant to the sixth cause of action, and the petitioners cross-appeal, as limited by their brief, from so much of the same judgment as denied those branches of the petition which were to annul the determinations on the grounds asserted in the first, second, third, and fourth causes of action and dismissed that portion of the proceeding.

ORDERED that the order and judgment is modified, on the law, by deleting the provision thereof granting those branches of the petition which were to annul the determinations dated July 25, 2006, on the grounds asserted in the fifth and sixth causes of action and to permanently enjoin the Town Board of Town of Brookhaven and Town of Brookhaven from approving the construction of the generator pursuant to the sixth cause of action, and substituting therefor a provision denying those branches of the petition and dismissing the proceeding; as so modified, the order and judgment is affirmed insofar as appealed from and cross-appealed from, with one bill of costs to the appellants-respondents and the additional respondent appearing separately and filing separate briefs.

This case concerns the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator in the Town of Brookhaven (hereinafter the project). In a prior

hybrid proceeding and action commenced by the petitioners, the Supreme Court, Nassau County, inter alia, found that the Long Island Power Authority (hereinafter LIPA), as lead agency, had satisfied its obligations under the State Environmental Quality Review Act (ECL art 8, hereinafter SEQRA) by taking a "hard look" at the potential environmental impacts of the project in a final environmental impact statement (hereinafter FEIS). In an order and judgment (one paper) entered August 25, 2006, the Supreme Court, among other things, in effect, dismissed the proceeding, and this Court affirmed that determination *(see Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817).

The developer, Caithness Long Island, LLC (hereinafter Caithness), thereafter applied to the Town Board of Town of Brookhaven (hereinafter the Town Board) for a special permit to build the project, and for a waiver and area variances regarding the height of the project. At a meeting of the Town Board on June 6, 2006, following public hearings and comments, a motion to approve a resolution to adopt the Town Board's SEQRA findings statement was denied by a four-to-three vote. The Town Board's vote on the special permit, waiver, and area variances remained pending and undecided at that time since the SEQRA findings statement had not been adopted. Several work sessions of the Town Board ensued, at which the project was discussed. In one such session held on June 20, 2006, one of the members of the Town Board stated that, before she was prepared to vote again on the resolution, she wanted to visit a facility similar to the proposed project that was located in Rhode Island. At a subsequent Town Board meeting held on July 25, 2006, a motion by one of the mem-

bers of the Town Board to waive the required 90-day period for reintroduction of the resolution on the SEQRA findings statement was granted. The resolution to approve the SEQRA findings statement thereafter passed by a five-to-two vote. The Town Board also passed the resolution approving the special permit, waiver, and area variances by the same vote count. At the meeting of July 25, 2006, one of the members of the Town Board who had changed the vote he cast at the meeting held on June 6, 2006, explained, inter alia, how his prior concerns regarding the project's impact on the environment, and the proffered benefits package to be provided by the developer had been assuaged.

The petitioners then commenced this proceeding. The Supreme Court, inter alia, granted those branches of the petition which were to annul the determinations of the Town Board on the grounds asserted in the fifth and sixth causes of action, finding that the Town Board acted in an arbitrary and capricious manner by failing to articulate a reason why it adopted the resolution approving the SEQRA findings statement after the resolution had been previously rejected. The remaining branches of the petition were denied, and the remainder of the proceeding was dismissed. The Town Board and the Town appeal, and Caithness separately appeals, from the provisions of the order and judgment that were adverse to them. The petitioners cross-appeal from so much of the order and judgment as was adverse to them.

Initially, the cross appeal has not been rendered academic and is not barred by the doctrine of laches *(see Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv.*

*Commn.*, 2 NY3d 727, 729; *Cohen v Krantz*, 227 AD2d 581). The Town Board, the Town, and Caithness (hereinafter collectively the appellants) have failed to demonstrate that the project is substantially complete. Further, the petitioners did not delay in instituting legal proceedings and sought to maintain the status quo by seeking a preliminary injunction before construction of the project had begun *(see generally Matter of Silvera v Town of Amenia Zoning Bd. of Appeals*, 33 AD3d 706; *Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906; *Vitiello v City of Yonkers*, 255 AD2d 506; *Matter of Uciechowski v Ehrlich*, 221 AD2d 866, 867-868; *cf. Matter of Mehta v Town of Montour Zoning Bd. of Appeals*, 4 AD3d 657, 657-658; *Matter of Group for S. Fork v Planning Bd. of Town of Southampton*, 306 AD2d 281).

The Supreme Court, however, improperly granted those branches of the petition which were to annul the determinations on the grounds asserted in the fifth and sixth causes of action, which alleged that the Town Board acted in an arbitrary and capricious manner by failing to articulate a reason why it passed the resolution approving the SEQRA findings statement after the resolution had been previously rejected. Following the meeting of June 6, 2006, at which the Town Board failed to adopt the resolution, the applications for the proposed land-use approvals were held in abeyance and remained on the Town Board's meeting agenda as "pending decisions" until July 25, 2006. Further, as the Town Board correctly argues, neither SEQRA nor its implementing regulations contain any provision prohibiting the Town Board from reconsidering its own unchanged SEQRA findings statement. Rather, SEQRA only

requires that an involved agency such as the Town Board make its own written findings statement before approving a project subject to an FEIS *(see* 6 NYCRR 617.2[p], 617.11[c]). Contrary to the petitioners' contention, 6 NYCRR 617.11 (a) does not preclude a revote under the circumstances presented here since the Town Board did not vote to amend its finding statements but, rather, revoted on a resolution to adopt its own unchanged SEQRA findings statement. Accordingly, the petitioners' contention that the Town Board lacked the authority and jurisdiction to conduct the revote is without merit. Moreover, the Town Board's determination to adopt, rather than reject, the resolution to approve the SEQRA findings statement was neither arbitrary nor capricious, but was based on reasons readily apparent on the face of the record.

The Supreme Court properly denied the petitioners' remaining SEQRA claims and dismissed those portions of the proceeding. Contrary to the petitioners' contention, the record demonstrates that the Town Board conducted an adequate and appropriate environmental review. In adopting its own findings statement, the Town Board, an involved agency, properly relied upon the FEIS and findings statement prepared by the lead agency, LIPA *(see Matter of Village of Pelham v City of Mount Vernon Indus. Dev. Agency*, 302 AD2d 399; *East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 189 AD2d 352). Moreover, the petitioners are foreclosed by the doctrines of res judicata and collateral estoppel from claiming that the SEQRA review conducted by LIPA was inadequate since those claims were litigated or could have been litigated in the prior hybrid proceeding and action com-

menced by the petitioners in the Supreme Court, Nassau County *(see Fitzgerald v Hudson Natl. Golf Club*, 35 AD3d 533).

The Supreme Court properly determined that the petitioners lacked standing to assert their claims challenging the Town Board's approval of the special permit, waiver, and area variances. The petitioners may not avail themselves of the presumption of injury in fact since they have not demonstrated that their properties lie in close proximity to the project *(see Matter of Long Is. Contractors' Assn v Town of Riverhead*, 17 AD3d 590, 595; *Matter of Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD2d 548; *Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845; *Matter of Casement v Town of Poughkeepsie Planning Bd.*, 162 AD2d 685; *see also Matter of Piela v Van Voris*, 229 AD2d 94), and they have otherwise failed to demonstrate that they will suffer any injury which is "in some way different from that of the public at large" *(Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, *774; see Matter of Long Is. Contractors' Assn v Town of Riverhead*, 17 AD3d 590).

The parties' remaining contentions either are without merit or need not be reached in light of our determination. SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

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Decided on November 25, 2008
2007-05605
(Index No. 29596/06)

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IN THE MATTER OF EAST END PROPERTY
COMPANY #1, LLC, *et al.*,

*appellants*,

—v—

PLANNING BOARD OF TOWN OF BROOKHAVEN, *et al.*,

*respondents*.

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Rosenberg Calica & Birney LLP, Garden City, N.Y. (Robert M. Calica and Judah Serfaty of counsel), for appellants.

Devitt Spellman Barrett, Smithtown, N.Y. (John M. Denby of counsel), for respondent Planning Board of Town of Brookhaven.

Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller and Richard Gabriele of counsel), and Beveridge & Diamond, P.C., New York, N.Y. (Stephen L. Gordon and Michael Murphy of counsel), for respondent Caithness Long Island, LLC (one brief filed).

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DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review a determination of the Planning Board of Town of Brookhaven dated September 25, 2006, which granted site plan approval for the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the petitioners appeal from a judgment of the Supreme Court, Suffolk County (Spinner, J.), dated May 22, 2007, which dismissed the proceeding on the ground that the petitioners lacked standing.

ORDERED that the judgment is affirmed, with one bill of costs.

The Supreme Court properly concluded that the petitioners lacked standing to commence this proceeding *(see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, *774; Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 595; *Matter of Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD2d 548; *Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845; *Matter of Casement v Town of Poughkeepsie Planning Bd.*, 162 AD2d 685; *see also Matter of Piela v Van Voris*, 229 AD2d 94).

The petitioners' remaining contentions need not be reached in light of our determination. SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

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Decided on November 25, 2008
2008-00757
(Index No. 17956/07)

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IN THE MATTER OF EAST END PROPERTY
COMPANY #1, LLC, *et al.*,

*appellants*,

—v—

TOWN BOARD OF TOWN OF BROOKHAVEN, *et al.*,

*respondents*;

LONG ISLAND POWER AUTHORITY,

*additional respondent.*

---

Rosenberg Calica & Birney LLP, Garden City, N.Y. (Robert M. Calica and Judah Serfaty of counsel), for appellants.

Devitt Spellman Barrett, Smithtown, N.Y. (John M. Denby and Jeltje DeJong of counsel), for respondents Town Board of Town of Brookhaven and Planning Board of the Town of Brookhaven.

Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller and Richard Gabriele of counsel), and Beveridge & Diamond, P.C., New York, N.Y. (Stephen L. Gordon and Michael Murphy of counsel), for respondent Caithness Long Island, LLC (one brief filed).

Carter Ledyard & Milburn LLP, New York, N.Y. (Christine A. Fazio, Stephen L. Kass, and Judith M. Wallace of counsel), for additional respondent Long Island Power Authority.

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DECISION & ORDER

In a proceeding, inter alia, pursuant to CPLR article 78 to review a determination of the Town Board of Town of Brookhaven dated June 5, 2007, made upon remittitur from the Supreme Court, Suffolk County, which adopted a findings statement pursuant to the State Environmental Quality Review Act (ECL article 8) regarding the approval of the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the petitioners appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Spinner, J.),

dated January 2, 2008, as denied the petition and dismissed the proceeding.

ORDERED that the appeal is dismissed as academic, without costs or disbursements.

In light of our decision and order on a companion appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County, dated May 22, 2007 *(see East End Prop. Co. #1, LLC v Town Bd. of Town of Brookhaven, AD3d* [Appellate Division Docket No. 2007-05041, decided herewith]), this appeal has been rendered academic.

SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

IAS PART XXI - COUNTY OF SUFFOLK

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PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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INDEX NO. 2006-29596

ORIG. MOTION DATE: 11/22/06
FINAL SUBMIT DATE: 03/28/07

EAST END PROPERTY COMPANY #1 LLC,
and MARK KASPIEV,

*Petitioners*,

—against—

THE PLANNING BOARD OF THE TOWN OF
BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

*Respondents*.

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This proceeding is related to the following action:

INDEX NO. 2006-23201

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND

CIVIC ASSOCIATION, INC and SOUTH YAPHANK CIVIC ASSOCIATION,

*Petitioners-Plaintiffs*,

—against—

THE TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

*Respondents-Defendants*,

—and—

LONG ISLAND POWER AUTHORITY,

*Additional Respondent-Defendant.*

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UPON the following papers numbered I to 137 read on this Motion:

- Petitioners' Petition & Supporting Papers (Pages 1-26 & Exhibit A);
- Respondent BROOKHAVEN PLANNING BOARD's Answer & Opposition (Pages 27-55 & Exhibits A-C & A-DDDDD);
- Respondent CAITHNESS' Answer & Opposition (Pages 56-116 & Exhibits 1-2 & A);
- Petitioners' Reply (Pages 117-137 &Appendix A); it is,

ORDERED, that the Petition is hereby denied in all respects.

Petitioners move this Court for an Order and Judgment:

a. Pursuant to CPLR Article 78, invalidating, cancelling and annulling a certain Site Plan Resolution rendered by Respondent BROOKHAVEN PLANNING BOARD on September 25, 2006;

b. Pursuant to CPLR 7804(e), directing Respondent BROOKHAVEN PLANNING BOARD to file with its Answer a certified transcript of the Record of proceedings under consideration.

This is special proceeding pursuant to CPLR Article 78. Petitioners seek a review of the actions of Respondents-Defendants, most particularly Respondents-Defendants BROOKHAVEN PLANNING BOARD (there also being a related action against Respondent-Defendant BROOKHAVEN TOWN BOARD, et al, as cited herein above). Petitioners seek to have said review invalidate, cancel and annul the actions of Respondents, culminating in adoption of a Site Plan approval by Respondent BROOKHAVEN PLANNING BOARD on September 25, 2006, regarding a 350 megawatt electric generating plant in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk and State of New York, known herein as the Caithness Project.

On September 25, 2006, Respondent BROOKHAVEN PLANNING BOARD, premised upon the Special Permit approval of the BROOKHAVEN TOWN BOARD, adopted a Resolution approving the Site Plan for the Caithness project, with numerous covenants and conditions to be met. On October 24, 2006, a Verified Petition was executed against Respondent BROOKHAVEN PLANNING BOARD and

Respondent CAITHNESS, served upon them on October 26, 2006, and October 30, 2006, respectively.

As with the companion action cited herein above, the first issue that must be decided is whether Petitioners have standing to assert this Article 78. Whether parties have standing to institute an action or proceeding is a threshold issue, which must be determined by the Court at the outset of any litigation *(See, Dairylea Cooperative v Walkley*, 38 NY2d 6, 377 NYS2d 451, 339 NE2d 865 [1975]; *Society of Plastics Industry v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778, 573 NE2d 1034 [1991].

In order to demonstrate standing, Petitioners must show that they will suffer a harm that is in some manner different than the harm the public may generally suffer, and that their alleged injuries fall within the zone of interest sought to be promoted or protected by the statute under which the municipality acted *(See, Society of Plastics Industry v County of Suffolk, supra; Rediiker v Zoning Board of Appeals of the Town of Philipstown*, 280 AD2d 548, 721 NYS2d 77 [2 Dept 2001]; *Long Island Business Aviation Association, Inc v Town of Babylon*, 29 AD2d 794, 815 NYS2d 217 [2 Dept 2006]). The Courts have ruled that petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property *(See, Olish v Heaney*, 2003 WL 21276342 [NY SupCt]; *Concerned Citizens for Open Space v City of White Plains*, 2003 WL 22283389 [NY SupCt]; *Oates v Village of Watkins Glen*, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed Wal-

Mart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance *(See, Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 414, 515 NYS2d 418, 508 NE2d 130 [1987]). Petitioners herein, none of whom live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code, do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large, and therefore lack standing to challenge the Resolution adopted by Respondent BROOKHAVEN PLANNING BOARD regarding approval of the Site Plan.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Petitioners for an Order and Judgment:

a. Pursuant to CPLR Article 78, invalidating, cancelling and annulling a certain Site Plan Resolution rendered by Respondent BROOKHAVEN PLANNING BOARD on September 25, 2006;

b. Pursuant to CPLR 7804(e), directing Respondent BROOKHAVEN PLANNING BOARD to file with its Answer a certified transcript of the Record of proceedings/under consideration;

is hereby denied in all respects.

Dated: Riverhead, New York
May 22, 2007

/S/ JEFFREY ARLEN SPINNERS
HON. JEFFREY ARLEN SPINNERS, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

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INDEX NO. 2006-23201
MOTION SEQ. NO. 001- Mot D
ORIG. MOTION DATE: 09/12/06
MOTION SEQ. NO.: 002 - MD
ORIG. MOTION DATE: 10/18/06
MOTION SEQ. NO.: 003 - MD
ORIG. MOTION DATE: 10/18/06
MOTION SEQ. NO.: 006 - MD
ORIG. MOTION DATE: 10/18/06
FINAL SUBMIT DATE: 03/28/07

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PRESENT:

HON. JEFFREY ARLEN SPINNER,
Justice of the Supreme Court

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC and SOUTH YAPHANK CIVIC ASSOCIATION,

*Petitioners-Plaintiffs,*

—against—

THE TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

*Respondents-Defendants,*

—and—

LONG ISLAND POWER AUTHORITY,

*Additional Respondent-Defendant.*

This proceeding is related to the following action:

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INDEX NO. 2006-29596

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EAST END PROPERTY COMPANY #1 LLC, and MARK KASPIEV,

*Petitioners,*

—against—

THE PLANNING BOARD OF THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

*Respondents.*

UPON the following papers numbered 1 to 575 read on these Motions:

- Petitioners-Plaintiffs' Order to Show Cause (001) & Supporting Papers (Pages 1-105 & Exhibits A-I);

- Respondent-Defendant BROOKHAVEN's Answer & Opposition (Pages 106-176 & Exhibits A-C, A, & A-QQQQ);
- Respondent-Defendant LIPA's Answer & Opposition (Pages 177-254 & Exhibits A-O & 4 unmarked exhibits attached to Memo of Law)
- Respondent-Defendant LIPA's Motion (003) & Supporting Papers (Pages 255-279 & Exhibits A-B);
- Respondent-Defendant CAITHNESS' Motion (002) & Supporting Papers (Pages 280-381 & Exhibits A-R & A);
- Petitioners-Plaintiffs' Reply (Pages 382-454);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 10/30/06 (Pages 455-456);
- Respondent-Defendant LIPA's Reply (Pages 457-478);
- Respondent-Defendant BROOKHAVEN's Support of Dismissal (Pages 479-501 & Exhibits A-B);
- Respondent-Defendant CAITHNESS' Reply (Pages 502-553);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 12/21/06 (Pages 554-556 & 1 unmarked Exhibit);
- Petitioner-Plaintiff's Letter (by Counsel) dated 05/02/07 (Pages 557-559 & 1 unmarked Exhibit);
- Respondent-Defendant LIPA's Letter (by Counsel) dated 05/03/07 (Pages 560-561);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 05/03/07 (Pages 562-564);

- Respondent-Defendant BROOKHAVEN's Letter (by Counsel) dated 03/02/07 [sic] (Pages 565-566);
- Respondent-Defendant CAITHNESS' Letter (by Counsel) dated 05/04/07 (Pages 567-571);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 05/07/07 (Pages 572-575);
- Respondent-Defendant CAITHNESS' Letter (by Counsel) dated 05/09/07 (Pages 576-578); it is,

ORDERED, that the Combined Petition-Complaint and Order to Show Cause of Petitioners-Plaintiffs (001) is hereby granted in part and denied in part, as set forth herein below; the Motion of Respondent-Defendant CAITHNESS (002) is hereby denied in all respects; the Motion of Respondent-Defendant LIPA (003) is hereby denied in all respects; and the second Order to Show Cause of Petitioners-Plaintiffs (006) is hereby dismissed, as same is rendered moot by the decisions rendered herein.

Petitioners-Plaintiffs move this Court (001) for an Order and Judgment:

a. Pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, dated July 25, 2006, which, *inter alia*, approved a proposed 350 megawatt electrical generating plant, to be constructed by Respondent-Defendant CAITHNESS on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York (Caithness Project) by granting a special permit pursuant to the Town Code of Respondent-Defendant BROOKHAVEN and substantial variances and

waivers from established zoning requirements (Resolution );

b. Pursuant to CPLR Article 78, annulling and invalidating a further Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, dated July 25, 2006, *inter alias*, rendered under the State Environmental Quality Review Act (SEQRA), by adopting a Finding Statement under SEQRA, by approving and accepting a prior Final Environmental Impact Statement (FEIS) for the Caithness Project promulgated and adopted by Respondent-Defendant LIPA, acting as purported "lead agency" under SEQRA (Resolution II);

c. Cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, for the purpose of authorizing and implementing the Caithness Project;

d. Pursuant to CPLR 3001, granting a Judgment in favor of Petitioners-Plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness and implementation of Resolution I, Resolution II and all other actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

e. Granting a permanent injunction in favor of Petitioners-Plaintiffs enjoining Respondents-Defen-

dants from implementing Resolution I, Resolution II or any other approvals authorizing the construction or implementation of the Caithness Project;

f. Granting Petitioners-Plaintiffs the costs and disbursements hereof.

Petitioners-Plaintiffs' above cited Order to Show Cause is filed upon their Petition-Complaint, which sets forth the above stated demands for relief under the following Claims for Relief:

1. As and for a First Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated Town Law and the Respondent-Defendant BROOKHAVEN Town Code (Town Code) in adopting Resolution I, said Resolution should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

2. As and for a Second Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated SEQRA, in approving Resolutions I and II, said Resolutions should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

3. As and for a Third Claim for Relief, Respondent-Defendant LIPA having violated SEQRA, Public Authorities Law § 1020-ff(aa) and State Finance Law §123-b in its SEQRA determination and approval of the PPA, the adoption of Resolutions I and II by Respondent-Defendant BROOKHAVEN TOWN BOARD premised thereupon must be annulled, and declared null, void and of no force and effect;

4. As and for a Fourth Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated SEQRA, Open Meetings Law (Public Officers Law Article 7), Town Law, the Town Code, Respondent-Defendant BROOKHAVEN TOWN BOARD procedures (Town Board Procedures), and having engaged in "contract zoning", Resolutions I and 1I should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

5. As and for a Fifth Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated SEQRA, the Town Code, Town Law, Open Meetings Law (Public Officers Law Article 7), Town Board Procedures, and various others laws, conducting themselves in an *ultra vires* manner, in adopting Resolution II by the holding of a "re-vote" (Resolution I having been also erroneously included herein in the filed pleadings) and having considered a Community Benefits Package without legal authority, Resolutions I and II should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

6. As and for a Sixth Claim for Relief, pursuant to CPLR 3001, requesting that the Court declare such matters concerning the lawfulness of the procedures preceding consideration and adoption of, as well as concerning the adoption and the lawfulness of, Resolutions I and II, the FEIS, the Findings Statement, the "re-vote", and all other actions taken by or on behalf of Respondent-Defendant BROOKHAVEN TOWN BOARD to approve the Caithness Project which are neces-

sary to result in full, complete andjust resolution of all claims and controversies among the parties relating to such matters, granting permanent injunctive relief barring Respondents-Defendants from carrying out, implementing or otherwise acting to implement or carry out Resolutions I and II or otherwise construct the Caithness Project;

Respondent-Defendant LIPA moves this Court (003) for an Order, pursuant to CPLR 3211(a) (1), (3), (4), (5) and (7), dismissing Petitioners-Plaintiffs' Sixth Claim for Relief asserted in the Petition-Complaint, on the grounds that the defense is founded upon documentary evidence, that Petitioners-Plaintiffs lack legal capacity to assert the Sixth Claim for Relief, that there is another action pending between the same parties for the same cause of action as asserted in the Sixth Claim, and that the Sixth Claim for Relief is barred by the doctrine of collateral estoppel and *res judicata*.

Respondent-Defendant CAITHNESS moves (002) this Court for an Order:

(a) Pursuant to 22 NYCRR § 130-1.1, imposing sanctions (in the form of litigation costa and attorney's fees) on Petitioners-Plaintiffs and their Counsel:

(I) for having raised issues and claims in this case that are plainly barred by the doctrines of *res judicata* and collateral estoppel, *as* a result of Petitioners-Plaintiffs' having previously raised (and lost) these same issues and claims in an action before Justice Cozzens, entitled *East End et al v Kessel et al*, Supreme Court, Nassau

County, Index No. 1410-2006 (Nassau Action);

(ii) for not advising this Court of the decision by Justice Cozzens in the Nassau Action, dated August 22, 2006, and entered on August 25, 2006 (Nassau Decision);

(iii) for not advising this Court that Petitioners-Plaintiffs appealed the Nassau Decision to the Appellate Division, Second Department;

(b) Pursuant to CPLR 3211(a) (1), (3), (4), (5) and (7), dismissing the Sixth Claim for Relief asserted in Petitioners-Plaintiffs' Petition-Complaint, which seeks declaratory relief under CPLR 3001 and related injunctive relief, on the grounds that:

(I) the alleged plenary Sixth Claim is duplicative of the First through Fifth Claims raised under CPLR Article 78;

(ii) it fails to state any claim for relief which is different that Petitioners-Plaintiffs' Article 78 claims;

(iii) there is another action pending between the parties for the same cause of action (Nassau Action);

(iv) many of the issues and claims in the Sixth Claim were decided in the Nassau Action and are barred by the doctrine of *res judicata* and collateral estoppel.

Petitioners-Plaintiffs move this Court (006) for an Order, pursuant to CPLR 7805, staying the Resolutions under review by enjoining and restraining

Respondent-Defendant CAITHNESS, its agents, servants and employees (including without limitation, Ross D. Ain, Senior Vice President) from undertaking construction, development, demolition, excavation, grading, paving, removal of vegetation, or any further action in furtherance of the construction of a proposed 350 megawatt electric generating facility on a 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk, State of New York, pursuant to a certain Special Permit and Variances heretofore granted by Respondent-Defendant BROOKHAVEN TOWN BOARD on July 25, 2006, and pursuant to a certain Site Plan approved by Resolution of Respondent-Defendant BROOKHAVEN's Planning Board, dated September 25, 2006, pending determination of this matter and the related Article 78 against Respondent-Defendant BROOKHAVEN's Planning Board, as referenced herein above, by this Court.

INTRODUCTION:

This is a "hybrid" action, seeking relief by way of a special proceeding pursuant to CPLR Article 78, as well as a declaratory judgment pursuant to CPLR Article 30, § 3001, and injunctive relief pursuant to CPLR Article 63. Petitioners-Plaintiffs seek a review of the actions of Respondents-Defendants, most particularly Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD (there also being a related action against Respondent-Defendant BROOKHAVEN's Planning Board, et al, as cited herein above). Petitioners-Plaintiffs seek to have said review invalidate, declare unlawful, arbitrary and capricious, annul, void and in all respects

render of no force and effect, the actions of Respondents-Defendants, culminating in adoption of two resolutions by Respondent-Defendant BROOKHAVEN TOWN BOARD on July 25, 2006, regarding approvals of a SEQRA determination and a special use permit for a 350 megawatt electric generating plant in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk and State of New York, known herein as the Caithness Project. The Court recites a brief statement of relevant facts, in order to cull almost 600 pages of argumentation (and several times that number of pages of exhibits) into a manageable overview of the matter at hand.

STATEMENT OF FACTS:

Respondent-Defendant LIPA selected Respondent-Defendant CAITHNESS to provide a state-of-the-art electric generating facility, which Respondent-Defendant CAITHNESS proposes to construct on a 15 acre portion of a 96 acre parcel, located as identified herein above, said land being zoned "L-1", light industry by Respondent-Defendant BROOKHAVEN prior to any action herein; said 15 acre portion being located within an Empire Development Zone, also established prior to any action taken herein.

Respondent-Defendant LIPA took on the status of "lead agency", pursuant to SEQRA (6 NYCRR 617.2(u)), in order to perform a review of the potential environmental impacts of construction and operation of such a facility, prior to selection of the present site. After it was chosen, Respondent-Defendant BROOKHAVEN worked with Respondent-Defendant LIPA, as an "involved agency", to scope

the Environmental Impact Statement, that process being concluded in December, 2005, after which several of the Petitioners-Plaintiffs herein instituted the Nassau Action against several of the Respondents-Defendants herein, regarding said SEQRA process. That litigation did not, and could not, include Respondent-Defendant BROOKHAVEN. During that time, Respondents-Defendants LIPA and BROOKHAVEN began negotiating a Community Benefits Package which consisted principally of Payment-In-Lieu-Of-Taxes (PILOTs).

The L-1 zoning district of Respondent-Defendant BROOKHAVEN only permits electric generating facilities by the granting of a special permit by Respondent-Defendant BROOKHAVEN TOWN BOARD, subject to criteria set forth in various sections of the Town Code. Pursuant to § 85-31 of said Town Code, Respondent-Defendant CAITHNESS applied for such special permit, with requests for variances from certain requirements within that zoning district, including an exhaust stack height of 170 feet (exceeding the Town Code imposed limitation of 125 feet) and a building height of 80 feet (exceeding the Town Code imposed limitation of 50 feet).

On March 9, 2006 and April 25, 2006, public hearings regarding said application were held by Respondent-Defendant BROOKHAVEN TOWN BOARD, each allegedly lasting about five hours. Presentations were made by representatives of Respondents-Defendants LIPA and CAITHNESS, and testimony was taken in opposition (including several Petitioners-Plaintiffs herein) and in support. Further presentations, discussions and comments continued through several other meetings and work sessions of

Respondent-Defendant BROOKHAVEN TOWN BOARD, with resolutions approving the SEQRA determination and special permit being carried forward on said Respondent-Defendant's Agenda throughout this time period.

On June 6, 2006, with all the members of Respondent-Defendant BROOKHAVEN TOWN BOARD present, the resolution approving the SEQRA determination, as set forth in the FEIS adopted by Respondent-Defendant LIPA, was voted upon, with four members voting no, and three voting yes. As stated on page 32 of Petitioners-Plaintiffs' Reply Memorandum of Law, dated October 23, 2006, *"Town's Return, exhibit WWW. . .statement of Supervisor Foley following the no-vote, indicating that the SEQRA certification had been "defeated".";* as stated on page 32 of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARDs' Memorandum of Law, dated September 22, 2006, ". . .the *Board voted on June 6, 2006 against accepting the SEQRA findings. . .";* and as states on page 21 of Respondent-Defendant CAITHNESS' Brief, dated September 25, 2006, *"Indeed, as Town Supervisor Foley precisely explained, "By [the SEQRA Findings] being defeated we cannot therefore, we cannot then go to 6A (Resolution 11 which is the actual application for the variance for the Caithness Power plant." See Return Exhibit WWW (emphasis added)."*

On July 25, 2006, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a number of resolutions regarding the Caithness Project, including:

1. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, pursuant to Town Board Rules of Procedure, Article II, Section 3, Subsection A5, to waive the 90 day requirement before reintroduction of the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements: adopted by a vote of 5-2;

2. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, to accept the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements, which was adopted by a vote of 5-2 after a Motion to Table, by Councilman McCarrick, seconded by Councilwoman Bissonette: defeated by a vote of 2-5;

3. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to take out of order from the Decision Pending Agenda, the resolution to approve the special permit application for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

4. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to approve the special permit application for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

Councilwoman Walsh, who moved the waiver of the 90 day rule and the reconsideration of the SEQRA resolution that had been previously defeated, had voted against approval of said resolution at the June 6, 2006 meeting of Respondent-Defendant BROOKHAVEN TOWN BOARD, and therefore having

been on the prior prevailing side was a proper party to make said motions.

The Petition-Complaint herein was verified by the various Petitioners-Plaintiffs between August 17 and August 22, 2006, and filed with the Court on August 23, 2006. Attached to Petitioners-Plaintiffs Order to Show Cause herein, signed by this Court on August 22, 2006, is a copy of the Nassau Action, which is also referenced in Petitioners-Plaintiffs papers supporting same. The decision of the Hon. Justice R. Bruce Cozzens was also rendered on August 22, 2006, the fact of which Petitioners-Plaintiffs and their Counsel could not have been aware when they sought the signature of this Court on their Order to Show Cause.

On September 25, 2006, the Planning Board of Respondent-Defendant BROOKHAVEN (Respondent in the related Article 78 cited herein above), premised upon the Special Permit approval of the Respondent-Defendant BROOKHAVEN TOWN BOARD, adopted a Resolution approving the Site Plan for the Caithness project, with numerous covenants and conditions to be met. On October 24, 2006, a Verified Petition was executed against Respondent-Defendant BROOKHAVEN's Planning Board and Respondent-Defendant herein CAITHNESS, served upon them on October 26, 2006, and October 30, 2006, respectively.

As this Court has stated in prior decisions, from the start it should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board *(see: Janiak v. Planning Board of the Town of Greenville*, 159 AD2d 574, 552 NYS2d 436 [2nd

Dept], *appeal denied*, 76 NY2d 707, 560 NYS2d 989, 561 NE2d 889 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896, 419 NYS2d 628 [2nd Dept 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful *(see, Castle Properties Co. v. Ackerson*, 163 AD2d 785, 558 NYS2d 334 [3rd Dept 1990]).

RESPONDENTS-DEFENDANTS' MOTIONS:

Beginning with that portion of the Motion (002) by Respondent-Defendant CAITHNESS for sanctions against Petitioners-Plaintiffs and their Counsel, the Court notes that Petitioners-Plaintiffs informed this Court of the pendency of the Nassau Action, including attaching a copy of the Petition-Complaint therein to their support papers filed in the instant action before this Court, and that there was absolutely nothing contumacious nor wilful in their conduct, there being, therefore, nothing to justifying sanctions.

As to remainder of the Motion (002) by Respondent-Defendant CAITHNESS, and the Motion (003) by Respondent-Defendant LIPA, both basically seek to dismiss the Sixth Claim for Relief asserted in the Petition-Complaint herein, upon the grounds that:

a. It fails to state a claim for relief different from those asserted in the instant Article 78;

b. There is another action pending between the same parties for the same cause of action asserted therein;

c. It is barred by the doctrine of collateral estoppel and *res judicata*.

This Court finds that, in fact, the Sixth Claim for Relief, asserted pursuant to CPLR Article 30, does seek relief different from the other five Claims for Relief asserted pursuant to CPLR Article 78. The difference between relief requested pursuant to Articles 30 and 78 are well settled. One need look no further than Professor David D. Siegel's Practice Commentary at CPLR 3001, answering the question *'What is a Declaratory Judgment?"*. Prof. Siegel notes that, *"The declaratory judgment action differs from all others in one major respect: the others end in a judgment enforcible [sic] through some kind of coercive relief. . .The declaratory judgment, on the other hand, just declares the rights of the parties: this marriage is valid; this divorce is not. . . The declaratory judgment recognizes that many disputes are resolved by a mere judicial statement. . . rather than remitting them to seek coercive steps against one another."*.

On the other hand, one might view the other facet of this hybrid action, the Article 78 portion (Claims First through Fifth), as the 'coercive relief sought by Petitioners-Plaintiffs, pursuant to the rights of the parties established and promulgated by the Court in the Declaratory Judgment facet of this hybrid action. CPLR 7801 sets forth that, *"Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article."*. So, obviously,

Petitioners-Plaintiffs are requesting that the Court establish and promulgate the rights of the parties, and by writs of certiorari and mandamus, review the actions of Respondents-Defendants and remand them for proper action, if so dictated by the Court's review. Therefore, these are quite clearly different requests for relief, and do not support dismissal of the Sixth Claim for Relief.

The Court finds that the other action pending is not exactly between the same parties, for not exactly the same cause of action, and that the differences are significant. Neither Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, nor their actions, are part of that other action, the Nassau Action, decided by Justice Cozzens, nor could the Sixth Claim for Relief be disposed of in the Nassau Action, as Petitioners-Plaintiffs are seeking the Court establish and promulgate the rights of parties not part of said Nassau Action for actions by those non-parties that were not asserted before Justice Cozzens, since they had not yet occurred. Therefore, these are also quite clearly different requests for relief, and do not support dismissal of the Sixth Claim for Relief.

That brings the Court's review of these Motions to the arguments proffered by movants regarding *res judicata* and collateral estoppel, emanating from Justice Cozzens' decision in the Nassau Action. While *res judicata* disposes of some of the issues pursuant to the Sixth Claim for Relief, and collateral estoppel disposes of more, they are not completely dispositive of all the issues to be considered under said Claim for Relief, for the same reasons set forth in the preceding paragraph, and therefore the

Motions to dismiss the Sixth Claim for Relief must be denied.

PETITIONERS-PLAINTIFFS' COMBINED PETITION-COMPLAINT:

*Res judicata* and collateral estoppel having been raised, the Court notes that there are a multitude of issues that are clearly disposed of by the decision in the Nassau Action, as the following review of the each of the Claims for Relief in the underlying Petition-Complaint, and the specific requests fo relief in the instant Order to Show Cause reveals, vastly limiting the matters upon which this Court needs to render its decision. Still further, there remains the issue of standing, which to some extent is also decided on the basis of *res judicata* and collateral estoppel, which will be addressed as well in the following review.

The Court notes the well proffered discussion of Counsel for Respondent-Defendant LIPA regarding the doctrines of *res judicata* and collateral estoppel. New York has adopted the "transactional analysis" approach regarding application of the doctrine of *res judicata*, setting forth that once a claim has been rendered to a final conclusion, all other claims arising therefrom on the same transaction or series of transactions are barred, including where based on differing theories or seeking differing remedies *(See, O'Brien v City of Syracuse*, 54 NY2d 353, 445 NYS2d 687 [1981]). The foundation upon which the doctrine of *res judicata* is built is the avoidance of conflicting judicial decisions *(See, Schuylkill Fuel Corp v Nieberg Realty Corp*, 250NY 308, 165 NE 456

[1929]). The related doctrine of collateral estoppel instead focuses on issues which have already been litigated, setting forth two basic requirements for application: (1) Identicality of the issue decided in the prior action with the issue which is decisive of the present matter; (2) Full and fair opportunity to have contested the issue in the prior action *(See, Halyalker v Board of Regents of State of New York*, 72 NY2d 261, 532 NYS2d 85 [1988]; *All Terrain Properties, Inc v Hoy*, 265 AD2d 87, 705 NYS2d 350 [1 Dept 2000]]).

First Claim for Relief:

The First Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD violated both Town Law and the Town Code in adopting the Special Permit Resolution, and therefore said Resolution should be declared null, void, arbitrary, capricious and of no force and effect. Here, the first issue that must be decided is whether Petitioners-Plaintiffs have standing to assert this Claim for Relief. As pointed out by Counsel for Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, whether parties have standing to institute an action or proceeding is a threshold issue, which must be determined by the Court at the outset of any litigation *(See, Dairylea Cooperative v Walkley*, 38 NY2d 6, 377 NYS2d 451, 339 NE2d 865 [1975]; *Society of Plastics Industry v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778, 573 NE2d 1034 [1991].

In order to demonstrate standing, Petitioners-Plaintiffs must show that they will suffer a harm that is in some manner different than the harm the public may

generally suffer, and that their alleged injuries fall within the zone of interest sought to be promoted or protected by the statute under which the municipality acted *(See, Society of Plastics Industry v County of Suffolk, supra; Redilker v Zoning Board of Appeals of the Town of Philipstown*, 280 AD2d 548, 721 NYS2d 77 [2 Dept 2001]; *Long Island Business Aviation Association, Inc v Town of Babylon*, 29 AD2d 794, 815 NYS2d 217 [2 Dept 2006]). The Courts have ruled that petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property *(See, Olish v Heaney*, 2003 WL 21276342 [NY SupCt]; *Concerned Citizens for Open Space v City of White Plains*, 2003 WL 22283389 [NY SupCt]; *Oates v Village of Watkins Glen*, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed Wal-Mart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance *(See, SunBrite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 414, 515 NYS2d 418, 508 NE2d 130 [1987]). Petitioners-Plaintiffs herein, none of whom live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code, do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large, and therefore lack standing to challenge Resolution I adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD regarding approval of the Special Permit, specifically.

Therefore, the First Claim for Relief must be dismissed in all respects.

Second Claim for Relief:

The Second Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, in approving the Special Permit Resolution and the SEQRA Resolution, and therefore said Resolutions should be declared null, void, arbitrary, capricious and of no force and effect. For the reasons set forth herein above disposing of the First Claim for Relief, Petitioners-Plaintiffs lack standing to challenge the adoption of the Special Permit Resolution, including Petitioners-Plaintiffs assertion in this Claim for Relief that the existence of Atlantic Point and its inhabitants was not considered.

First, this Court notes that, pursuant *to res judicata* and collateral estoppel, the decision in the Nassau Action clearly establishes that the Petitioners-Plaintiffs do, in fact, have standing pursuant to SEQRA, and this Court agrees. Specifically, Justice Cozzens wrote, "*. . .these petitioners have standing to bring this action for SEQRA causes of action*", after having named various Petitioners-Plaintiffs in the instant action. Therefore, the issue of Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the SEQRA Resolution on July 25, 2006, is properly brought before this Court.

As to the assertions that Respondents-Defendants violated SEQRA by way of Impermissible Segmentation regarding the natural gas pipeline, and a failure to prepare and adopt a supplemental environmental impact statement (SEIS) following

discovery of a pine barrens ecosystem, Petitioners-Plaintiffs cannot re-litigate these SEQRA questions, as they were specifically disposed of, pursuant to collateral estoppel, since both were directly addressed in the decision in the Nassau Action, regarding the lead agency's adoption of the FEIS. Justice Cozzens wrote:

a. in ruling on the issue of Impermissible Segmentation, ". . .*SEQRA is preempted by FERC. . . respondents motion to dismiss is granted. . .*"; and

b. in ruling on the issue of the SEIS (specifically including, but not limited to. the assertion that ". . .a *rare plant community would be affected. . .*"),".. .*petitioner's allegations do not amount to specific significant adverse environmental impacts not addressed or inadequately addressed in the FEIS. (6 NYCRR 617.9 [a] [7] [1]). . . defendant's motion is granted. . .*".

Therefore, other than on the issue of standing to challenge pursuant to SEQRA, the Second Claim for Relief must be dismissed in all respects.

Third Claim for Relief:

The Third Claim for Relief asserts that, Respondent-Defendant LTA having violated SEQRA, Public Authorities Law § 1020-ff(aa) and State Finance Law § 123-b in its SEQRA determination and approval of the PPA, the subsequent adoption of the Special Permit Resolution and the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD, premised upon said unlawful actions, cannot be sustained, and therefore said adoptions must

be declared null, void and of no force and effect. Again, for the reasons set forth herein above disposing of the First Claim for Relief, Petitioners-Plaintiffs lack standing to challenge the adoption of the Special Permit Resolution.

As to the assertion that Respondent-Defendants LTA's violation of the three alleged areas of law in their preparation and adoption of the FEIS renders a nullity Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of their SEQRA Resolution, the Court again notes that Petitioners-Plaintiffs cannot re-litigate these questions as they were disposed of, pursuant to *res judicata*, since all three were directly addressed in the decision in the Nassau Action, regarding the lead agency's adoption of the FEIS. Justice Cozzens wrote:

a. in ruling on the issue of the environmental review process being procedurally improper, "*. . .the Court finds that the respondents complied with the procedural requirements of SEQRA. . . that any perceived procedural defects cannot be deemed to be fatal or require nullification of the entire environmental review procedure, which was otherwise undertaken in accordance with SEQRA. (See, Business and Community Coalition Save Brownsville v NYCDEP and Dept, 1991] 173 AD 2d 586, 570 NYS 2nd 169). . . respondents motion to dismiss is granted. . .*", regarding the First Cause of Action, and the Court further dismissed other challenges to the SEQRA process in said proceeding under the Third and Fourth Causes of Action therein;

b. in ruling on the issue of violating Public Authorities Law § 1020-L in order to demonstrate standing ". . .*It is incumbent upon petitioners to show an injury in fact that is different from that of the general public. Society of Plastics Industry v County of Suffolk (1991) 77 NY2d 761, 570 NYS2d 778. . . When a petitioner fails to show an injury in fact, being a ratepayer of a utility does not confer standing. Lederle Laboratories v Public Service Commission (3*rd *Dept, 1981) 84 A.D.2d 900, 444 NYS2d 779.*", dismissing that cause of action; and

c. in ruling on the issue of violating State Finance Law § 123-b, regarding the PPA and the Community Benefits Package, "*. . .petitioner fail to allege the use of any state funds. . . A State Finance Law action can be brought only when there is a wrongful expenditure of state funds. Weimer v Board of Education (1981) 52 NY2d 148, 436 NYS2d 853. The petitioner must show that the challenged expenditures are traced to identifiable State funds and are an illegal use of funds. Public Utility Law Project of New York, Inc v New York State Public Service Commission (3rd Dept., 1998) 252 AD2d 55, 681 NYS2d 396*", dismissing that cause of action.

Therefore, since the assertion that the actions of Respondent-Defendant LIPA were in violation of law regarding these matters cannot be sustained, then the allegation that the actions of Respondent-Defendant BROOKHAVEN TOWN BOARD, reliant thereupon, can neither be sustained, and the Third Claim for Relief must be dismissed in all respects.

Fourth Claim for Relief:

The Fourth Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, Open Meetings Law (Public Officers Law Article 7), Town Law, the Town Code and Town Board Procedures, and engaged in "contract zoning", in approving the Special Permit Resolution and the SEQRA Resolution, and therefore said Resolutions should be declared null, void, arbitrary, capricious and of no force and effect. Once again, for the reasons set forth herein above disposing of the First Claim for Relief, Petitioners-Plaintiffs lack standing to challenge the adoption of the Special Permit Resolution, including Petitioners-Plaintiffs assertions in this Claim for Relief claiming "contract zoning" and violations of Town Law and the Town Code. Furthermore, for the reasons set forth herein above regarding the decision in the Nassau Action disposing of the issue of the environmental review process being procedurally improper, Petitioners-Plaintiffs cannot re-litigate general assertions of violation of SEQRA herein.

As to Petitioners-Plaintiffs assertion that Respondent-Defendant BROOKHAVEN TOWN BOARD violated the Open Meetings Law (Public Officers Law Article 7), upon a thorough review of said Article and all the submissions by all parties herein, the Court finds no substantive allegations or proof that such a violation occurred. As pointed out by Counsel for Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, in order for a gathering of members of a public body to constitute a "meeting" pursuant to Public Officers Law, there must have been a quorum present *(See, Britt v*

*County of Niagara*, 82 AD2d 65, 440 NYS2d 790 [4 Dept 1981]; *Buffalo Evening News, Inc v Buffalo Municipal Housing Authority*, 134 Misc2d 155, 510 NYS2d 422 [SuptCt. New York Co, 1986]). Similarly to the instant matter, in *Olish v Heaney, supra*, petitioners bolstered their claims of an Open Meetings violation through newspaper articles, and as with this matter, the Court therein determined that the record did not support such a claim. In order to sustain such an assertion, more than mere conclusory allegations are requisite. The statement of Councilman Mazzei proffered by Petitioners-Plaintiffs that "*I have been to many, many meetings on both the Town Board meetings and outside of the Town Board. . .*" does not demonstrate that those meetings "*outside of the Town Board*" qualify as 'meetings' within the legal definition of Public Officers Law, Article 7, the term 'meeting' having diverse and varied definitions as used within conversational context that do not rise to a violation of the Open Meetings Law.

As to Petitioners-Plaintiffs assertion that Respondent-Defendant BROOKHAVEN TOWNBOARD violated their own Town Board Procedures, once again the record does not support such allegations. Article II (Meetings & Hearings) of said Respondent-Defendant's Rules of Procedure, at Section 3 (Rules of Procedure), Subsection A.5, states that, "*A Resolution, Local Law or Ordinance that receives less than a majority of votes shall not be reintroduced for ninety days (90) or unless this rule is waived by a super majority vote of the Town Board.*". The Statement of Facts set forth herein above demonstrates beyond dispute that said Respondent-Defendant did in fact move by super majority to

reintroduce the SEQRA Resolution challenged by Petitioners-Plaintiffs herein, and that they voted by super majority to consider it out of turn as well, prior to conducting another vote regarding said Resolution, and therefore their actions did comply with their own Rules of Procedure, and this challenge cannot be sustained.

Therefore, the Fourth Claim for Relief must be dismissed in all respects.

Fifth Claim for Relief:

The Fifth Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD, having violated SEQRA, the Town Code, Town Law, Open Meetings Law, and Town Board Procedures, conducted themselves in an *ultra vires* manner in adopting the SEQRA Resolution:

1. by the holding of a "re-vote"; and
2. by considering a Community Benefits Package without legal authority;

and therefore said Resolution should be declared null, void, arbitrary, capricious and of no force and effect. For all the reasons set forth herein above in this decision, the assertions as to SEQRA (generally), the Town Code, Town Law, Open Meetings Law, Town Board Procedures and the Community Benefits Package have been disposed of, either by the decision of this Court or the decision of the Court in the Nassau Action, and will not be revisited here.

That leaves the Court with the important question of whether Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the SEQRA Resolution

was arbitrary and capricious, and therefore null, void and of no force and effect. The instant issue, considering the disposal of all other SEQRA matters settled herein above and in the Nassau Action, narrows the inquiry to the manner in which Respondent-Defendant BROOKHAVEN TOWN BOARD adopted the SEQRA Resolution, and whether that "re-vote" violated well settled law.

Some have argued that Respondent-Defendant BROOKHAVEN TOWN BOARD, in discharging its duties herein, was acting in a legislative capacity, while Petitioners-Plaintiffs maintain that it was conducting itself in an administrative capacity in adopting the SEQRA Resolution disputed in this matter. In Respondent-Defendant BROOKHAVEN TOWN BOARD's Memorandum of Law dated September 22, 2006, at page 10, the case of *Kelsky v Lewisboro* is cited in support of the argument that Petitioners-Plaintiffs herein lack standing to challenge the granting of the special permit relevant to the Caithness Project, and said citation begins with the words, *"Generally to establish standing to review an administrative determination. . ."*. Furthermore, Justice Cozzens, in rendering his decision in the Nassau Action, writes, in the portion granting Petitioners-Plaintiffs standing pursuant to SEQRA, *"The opponent of the administrative action in a SEQRA proceeding. . ."*. Still further, the Appellate Division, Second Department, in *Green v LoGrande*, 96 AD2d 524, 464 NYS2d 831 [1983], states, in relevant part, *"The administrative authority, be it a town board or a zoning board of appeals, is required to grant a special use permit. . ."*; and in *Holbrook Associates Development Co v McGowan*, 261 AD2d 620, 690 NYS2d 686 [1999], again discusses

the requirement of administrative authority to grant a special use permit, regarding the Town Board. It is well settled law in New York that Town Boards have both legislative and administrative authority, and that in rendering decisions regarding special permit applications and the SEQRA review requisite thereto, Town Boards are acting exclusively in their distinct administrative capacity.

That brings this review to the question of whether the June 6, 2006, vote of the Town Board, regarding the SEQRA Resolution, was a denial or not, some having argued that it was not. First, the Court notes, as set forth in the Statement of Facts herein above, that Supervisor Foley, following said vote, properly acknowledged that said Resolution had been defeated, and further correctly determined that this disallowed action on the Special Permit Resolution. The Court of Appeals, in *Tall Trees Const Corp v Zoning Board of Appeals of the Town of Huntington*, 97 NY2d 86, 761 NE2d 565, 735 NYS2d 873 [2001], ruled, "*We conclude that when a quorum of the Board is present and participates in a vote on an application, a vote of less than a majority of the Board is deemed a denial*", when there was a tie vote. In rendering that decision, the Court of Appeals cited the Appellate Division, Fourth Department's decision in *Monro Muffler/Brake, Inc v Town Board of the Town of Perinton*, 222 AD2d 1069 (4 Dept 1995), wherein the Appellate Division ruled that, "*Supreme Court properly determined that the failure of respondent to approve by a majority vote the application of petitioner. . . for a special use permit. . . constituted a valid determination to deny the application.*". It is clear to this Court that the SEQRA Resolution regarding the Caithness Pro-

ject was denied by the majority vote against its approval on June 6, 2006. Therefore, its reconsideration on July 25, 2006, was indisputably a re-vote, and not, as set forth in Respondent-Defendant BROOKHAVEN TOWN BOARD's Memorandum of Law dated September 22, 2006, at page 29, that "*the board simply did not have enough votes to approve the SEQRA findings.*".

It is well settled that, as SEQRA does not contain provisions addressing judicial review, Courts must adhere to the standards generally applicable to administrative proceedings, in that an agency's determination must be sustained unless the Court concludes it was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion *(See, Responsible Southtown Development v Roosevelt Island Operating Corp*, 735 NYS2d 83 [1 Dept 2001]). In arriving at that conclusion, this Court is also aware that literal compliance with both the letter and spirit of SEQRA is required, and mere substantial compliance will not suffice *(See, Golten Marine Co, Inc v NYS Department of Environmental Conservation*, 193 AD2d 742, 598 NYS2d 59 [2 Dept 1993]; *Group for S. Fork v Wines*, 190 AD2d 794; *Holmes v Brookhaven Town Planning Board*, 137 AD2d 601, *quoting Inland Vale Farm Co v Stergianopoulos*, 104 AD2d 395, *aff'd* 65 NY2d 718; *EFS Venture Corp v Foster*, 71 NY2d 359).

As pointed out by Petitioners-Plaintiffs, the Appellate Division, Second Department recently confirmed, in *Corona Realty Holdings, LLC v Town of North Hempstead*, 32 AD3d 393, 820 NYS2d 102 [2006], that the determination of an administrative

agency that neither adheres to its own prior precedent, nor indicates its reason for reaching a different result on essentially the same facts, is on its face arbitrary and capricious *(See, Field Delivery Service*, 66 NY2d 516, 488 NE2d 1223, 498 NYS2d 111; Al *Turi Landfill v NYS Department of Environmental Conservation*, 289 AD2d 231, 735 NYS2d 61, *affd* 98 NY2d 758, 781 NE2d 892, 751 NYS2d 827); and an agency's failure to provide a valid and rational explanation for the departure from its prior precedent mandates reversal, even though substantial evidence may exist in the record to otherwise support the determination *(See, Al Turi Landfill v NYS Department of Environmental Conservation, supra; Field Delivery Service, supra)*.

As also pointed out by Petitioners-Plaintiffs, the Appellate Division, Second Department has remained on this track, ruling in *Campo Grandchildren Trust v Colson*, 2007 NY Slip Op 03302, decided on April 17, 2007, that the determination of a zoning board of appeals cannot be sustained if it lacks a rational basis and is arbitrary and capricious *(See, Fuhst v Foley*, 45 NY2d 441, 410 NYS2d 56, 382 NE2d 756; *Greenfield v Board of Appeals of Village of Massapequa Park*, 21 AD3d 556, 800 NYS2d 728; *Crystal Pond Homes v Prior*, 305 AD2d 595, 759 NYS2d 366); a determination of a zoning board of appeals that neither adheres to its own precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious *(See, Knight v Amelkin*, 68 NY2d 975, 510 NYS2d 550, 503 NE2d 106, *quoting Field Delivery Service, supra; Corona Realty Holdings, LLC v Town of North Hempstead, supra)*, mandating reversal, even if there may otherwise be evidence in

the record sufficient to support the determination *(See, Corona Realty Holdings, LLC v Town of North Hempstead, supra)*.

This Court further notes that compliance with these requirements is not onerous. It is further well settled that the Courts in New York have accorded great deference to the explanations offered by boards for their contrary determinations under similar circumstances, as well as to changes in policy *(See, Hawryluk v Zoning Board of Appeals of the Town of Huntington*, 173 AD2d 826, 571 NYS2d 53 [2 Dept 1991]; *Ciampa v Hudson*, 158 AD2d 925, 551 NYS2d 89 [4 Dept 1990]; *Pesek v Hitchock*, 156 AD2d 690, 549 NYS2d 164 [2 Dept 1989]; *Knight v Amelkin, supra)*. The Appellate Division, Second Department, recently confirmed that the Courts will generally defer to the explanation for reaching a different result on similar facts, sustaining the determination because a rational explanation for reaching the different result on similar facts was provided *(See, Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2 Dept 2006], *citing Knight v Amelkin, supra)*.

That leaves this Court confronted with the inescapable fact that the transcript submitted by Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD demonstrates that the SEQRA Resolution was brought up in the public session of the July 25, 2006 meeting, was properly reintroduced by a waiver of the Rules of Procedure, but then adopted with the same language, absent an explanation in the SEQRA Resolution for the adoption (as opposed to the prior denial), and without any discussion on the record prior to said adoption.

This does not meet the standards set forth clearly herein above, as promulgated by both the Appellate Division and Court of Appeals, and thus fails to meet the standard of literal compliance with both the letter and spirit of SEQRA.

Therefore, the Fifth Claim for Relief must be granted, solely to the extent that the adoption of the SEQRA Resolution by re-vote of Respondent-Defendant BROOKHAVEN TOWN BOARD, devoid of the requisite explanation for reaching the different result (passage as opposed to rejection), renders said action arbitrary and capricious, resulting in the declaration of said SEQRA Resolution null, void and of no force and effect, and requiring, pursuant to Article 78, that it be remanded to Respondent-Defendant BROOKHAVEN TOWN BOARD for proper action.

The Court notes here, as will be set forth further herein below (and in the companion decision regarding the Article 78 proceeding by these Petitioners-Plaintiffs against Respondent-Defendant BROOKHAVEN's Planning Board), that the annulment of the SEQRA Resolution brings with it the nullification of the Special Permit Resolution adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD, because it was premised upon said SEQRA Resolution, as well as the nullification of the Site Plan approval (but not the SEQRA Resolution) of Respondent-Defendant BROOKHAVEN's Planning Board, because it was also premised upon both the SEQRA Resolution (and the Special Permit Resolution) of Respondent-Defendant BROOKHAVEN TOWN BOARD (in short, a domino effect).

Sixth Claim for Relief:

The Sixth Claim for Relief, pursuant to CPLR 3001, requests that the Court declare such matters concerning the lawfulness of the procedures preceding consideration and adoption of, as well as concerning the adoption and the lawfulness of, Resolutions I and II, the FEIS, the Findings Statement, the "revote", and all other actions taken by or on behalf of Respondent-Defendant BROOKHAVEN TOWN BOARD to approve the Caithness Project which are necessary to result in full, complete and just resolution of all claims and controversies among the parties relating to such matters, granting permanent injunctive relief barring Respondents-Defendants from carrying out, implementing or otherwise acting to implement or carry out Resolutions I and II or otherwise construct the Caithness Project;

The issues of SEQRA, generally, including the FEIS, were all disposed of by the decision rendered in the Nassau Action, as stated herein above. The issue of the Special Permit Resolution was disposed of by the decision herein above, to the extent of Petitioners-Plaintiffs standing to challenge same. The Nassau Action granted them standing to challenge the SEQRA procedures, while ruling against them on the specifics, but that same grant of standing allowed them to challenge the instant and separate SEQRA actions of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, and the manner of adoption by Respondent-Defendant BROOKHAVEN TOWN BOARD of the SEQRA Resolution.

The odd manifestation of the situation at hand is that, although lacking standing to challenge the Spe-

cial Permit Resolution, as determined herein above, their success in challenging the manner of adoption of the SEQRA Resolution, as determined pursuant to the immediately prior Claim for Relief, serves to annul the Special Permit Resolution, as it cannot stand without a properly adopted SEQRA Resolution.

Furthermore, in the related action against Respondent-Defendant BROOKHAVEN's Planning Board, while Petitioners-Plaintiffs lack standing to challenge same pursuant to their failure to demonstrate they are within the zone of interest or suffer injury different from the general public, their right to challenge pursuant to SEQRA, and the resultant nullification of Respondent-Defendant BROOKHAVEN TOWN BOARD's action, deprives the Planning Board of the ability to take action to approve the site plan, for lack of a properly adopted Special Permit, and therefore renders the actions of Respondent-Defendant BROOKHAVEN's Planning Board a nullity, void and of no force and effect.

Therefore, the Sixth Claim for Relief must be granted, solely to the extent that both the SEQRA Resolution and the Special Permit Resolutions, as well as the Site Plan Resolution of the Respondent-Defendant BROOKHAVEN's Planning Board, as they currently stand, are null, void and of no force and effect.

PETITIONERS-PLAINTIFFS' ORDER
TO SHOW CAUSE:

Petitioners-Plaintiffs Order to Show Cause was brought before this Court (001) for an Order and Judgment granting various relief, premised upon the above discussed Petition-Complaint.

First, pursuant to CPLR Article 78, Petitioners-Plaintiffs seek to cancel, annul and invalidate the Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD approving the Special Permit for construction of the 350 megawatt electrical generating plant by Respondent-Defendant CAITHNESS. Petitioners-Plaintiffs achieve this result, by way of their challenge to the requisite SEQRA Resolution upon which the Special Permit Resolution was adopted, even though they lacked standing to directly challenge approval of the Special Permit, as set forth herein above.

Second, pursuant to CPLR Article 78, Petitioners-Plaintiffs seek to annul and invalidate the Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, rendered under the State Environmental Quality Review Act (SEQRA), approving the Finding Statement, accepting the FEIS for the Caithness Project promulgated and adopted by Respondent-Defendant LIPA, acting as "lead agency". Petitioners-Plaintiffs directly achieved this result, due to the manner of adoption of the SEQRA Resolution, as set forth herein above in this decision, having standing to challenge pursuant to SEQRA, as set forth in the Nassau Action, with the concurrence of this Court.

Third, Petitioners-Plaintiffs seek to cancel, annul and invalidate all other Resolutions, actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, for the Caithness Project. Lacking specification upon which this Court can determine the relief Petitioners-Plaintiffs seek in this catch all, same must be denied.

Fourth, pursuant to CPLR 3001, Petitioners-Plaintiffs seek Judgment declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness and implementation of the above referenced Resolutions by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, with reference to the Caithness Project, as may be required to fully adjudicate the claims and controversies recited herein. This is a restatement of the Sixth Claim for Relief, which has already been adjudicated to the extent set forth herein above.

Fifth, Petitioners-Plaintiffs seek to enjoin Respondents-Defendants from implementing any approvals authorizing the construction or implementation of the Caithness Project. Having succeeded in nullification of the approvals herein, this further relief is moot and unnecessary, and same must be denied.

Sixth, Petitioners-Plaintiffs seek the costs and disbursements hereof. There being no showing that Respondents-Defendants' actions were wilful or contumacious, same must be denied.

PETITIONERS-PLAINTIFFS' MOTION:

Petitioners-Plaintiffs Motion (006) for an Order staying the Resolutions and restraining Respondent-Defendant CAITHNESS from undertaking any action in furtherance of the construction of the proposed 350 megawatt electric generating facility in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk, State of New York, pursuant to said Resolutions and the Site Plan approval of Respondent-Defendant BROOKHAVEN's Planning Board, pending determination of this matter and the related Article 78 against said Planning Board, is hereby dismissed as moot, in light of the above determination that the SEQRA and Special Permit Resolutions (and hence the Planning Board Site Plan Resolution) are null, void and of no force and effect.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that regarding Petitioners-Plaintiffs' underlying Combined Petition-Complaint:

1. As to the First Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated Town Law and the Town Code in adopting the Special Permit Resolution, this Court has determined that Petitioners-Plaintiffs lack standing to bring this Claim for Relief, and therefore the First Claim for Relief is hereby denied in all respects;

2. As to the Second Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA in adopting these Resolutions, this Court has determined that:

a. Petitioners-Plaintiffs lack standing to bring this Claim for Relief as to the Special Permit Resolution;

b. Petitioners-Plaintiffs have standing to challenge pursuant to SEQRA, having been previously determined intheNassau Action, and may contest Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of their SEQRA Resolution;

c. Petitioners-Plaintiffs may not re-litigate herein the issues of impermissible segmentation and failure to prepare and adopt a SEIS, same having been determined against them in the Nassau Action; and therefore, the Second Claim for Relief is hereby granted solely to the extent of Petitioners-Plaintiffs standing to challenge pursuant to SEQRA herein, and is hereby denied in all other respects;

3. As to the Third Claim for Relief, asserting that, Respondent-Defendant LIPA having violated SEQRA, Public Authorities Law § 1020-ff(aa) and State Finance Law § 123-b in its SEQRA determination and approval of the PPA, the subsequent adoption of the Special Permit Resolution and the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD, premised thereupon, is therefore unlawful, this Court has determined that:

a. Petitioners-Plaintiffs lack standing to bring this Claim for Relief as to the Special Permit Resolution;

b. Petitioners-Plaintiffs may not re-litigate herein the remainder of the issues raised in

this Claim for Relief, same having been determined against them in the Nassau Action;

and therefore , the actions of Respondent-Defendant LIPA having been validated by the decision in the Nassau Action, the Third Claim for Relief is hereby denied in all respects;

4. As to the Fourth Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, Open Meetings Law (Public Officers Law Article 7), Town Law, the Town Code, Town Board Procedures, and engaged in "contract zoning", in adopting the Special Permit Resolution and the SEQRA Resolution, this Court has determined that:

   a. Petitioners-Plaintiffs lack standing to bring this Claim for Relief as to the Special Permit Resolution, including the allegations of "contract zoning" and violations of Town Law and the Town Code;

   b. Petitioners-Plaintiffs may not re-litigate herein the general assertions of SEQRA violations herein, same having been determined against them in the Nassau Action;

   c. Petitioners-Plaintiffs have not proffered substantive allegations in support of the assertion that the Open Meetings Law has been violated;

   d. Respondent-Defendant BROOKHAVEN TOWN BOARD did not violate their Rules of Procedure, as clearly demonstrated by the transcript of their July 25, 2006 meeting;

and therefore, the Fourth Claim for Relief is hereby denied in all respects;

5. As to the Fifth Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, the Town Code, Town Law, Open Meetings Law (Public Officers Law Article 7), Town Board Procedures, and various others laws, conducting themselves in an *ultra vires* manner, in adopting the SEQRA Resolution by the holding of a "re-vote" and considering a Community Benefits Package without legal authority; this Court has determined that:

   a. The issues of SEQRA (generally), the Town Code, Town Law, Open Meetings Law, Town Board Procedures and the Community Benefits Package, have been disposed of, either by the decision of this Court herein, or the decision of the Court in the Nassau Action, and need not be restated;

   b. Petitioners-Plaintiffs sustained their allegations challenging adoption of the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD on July 25, 2006, as set forth herein above in the body of this decision;

   and therefore, the Fifth Claim for Relief is hereby granted to the extent that the adoption of the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD is arbitrary and capricious, and therefore null, void and of no force and effect, and is hereby further remanded to Respondent-Defendant BROOKHAVEN TOWN BOARD for proper action, and is hereby denied in all other respects;

6. As to the Sixth Claim for Relief, pursuant to CPLR 3001, requesting declaratory judgment concerning:

   (i) the lawfulness of procedures preceding consideration and adoption of, as well as concerning the adoption and lawfulness of, the Special Permit Resolution and the SEQRA Resolution, the FEIS, the Findings Statement, the "re-vote", and all other actions taken by or on behalf of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD to approve the Caithness Project, necessary for full, complete and just resolution of all claims and controversies among the parties relating thereto; and

   (ii) permanent injunctive relief barring Respondents-Defendants from carrying out, implementing or otherwise acting to implement or carryout the Special Permit Resolution and the SEQRA Resolution or otherwise construct the Caithness Project;

   this Court notes that:

   a. The issues of SEQRA, generally, including the FEIS, were determined and disposed of by the decision rendered in the Nassau Action, as stated herein above;

   b. The issue of the Special Permit Resolution was determined and disposed of by the decision herein above, to the extent that Petitioners-Plaintiffs lack standing to challenge same;

c. The issue of Petitioners-Plaintiffs' standing to challenge, pursuant to SEQRA, was determined and granted by the decision rendered in the Nassau Action (while ruling against them on the specifics), which in turn determined their standing to challenge the instant and separate SEQRA actions of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, and the manner of adoption of the SEQRA Resolution by said Respondent-Defendant;

and therefore, the Sixth Claim for Relief must be granted, to the extent that:

1. The SEQRA Resolution is hereby declared null, void and of no force and effect; and
2. The Special Permit Resolutions is hereby declared null, void and of no force and effect, because a valid SEQRA determination must be adopted prior to its approval;
3. The Site Plan Resolution of Respondent-Defendant BROOKHAVEN's Planning Board is hereby declared null, void and of no force and effect, because a valid Special Permit approval must be adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD prior to its approval;

and it is further

ORDERED, therefore, that regarding Petitioners-Plaintiffs' Order to Show Cause (001):

a. Judgment and Order, pursuant to CPLR Article 78, cancelling annulling and invalidating the Special Permit Resolution, with waivers and vari-

ances, adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD, on July 25, 2006, is granted for the reasons set forth herein above;

b. Judgment and Order, pursuant to CPLR Article 78, annulling and invalidating the SEQRA Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, dated July 25, 2006, is granted for the reasons set forth herein above;

c. Judgment and Order cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, for the purpose of authorizing and implementing the Caithness Project, is hereby denied for lack of specificity as to the relief sought;

d. Judgment and Order, pursuant to CPLR 3001, granting Declaratory Judgment in favor of Petitioners-Plaintiffs as to matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness and implementation of Special Permit Resolution, the SEQRA Resolution and all other actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein, is granted solely to the specific extent set forth herein above in this decision;

e. Judgment and Order granting a permanent injunction in favor of Petitioners-Plaintiffs enjoining Respondents-Defendants from imple-

menting any approvals authorizing construction or implementation of the Caithness Project, is hereby dismissed as same has been rendered moot by the decision herein;

f. Judgment and Order granting Petitioners-Plaintiffs the costs and disbursements hereof, is hereby denied, as there has been no showing that the actions of Respondents-Defendants were wilful or contumacious;

and it is further.

ORDERED, that the Motion (003) of Respondent-Defendant LIPA for an Order, pursuant to CPLR 3211(a) (1), (3), (4), (5) and (7), dismissing Petitioners-Plaintiffs' Sixth Claim for Relief asserted in the Petition-Complaint, is hereby denied in all respects; and it is further

ORDERED, that the Motion (002) of Respondent-Defendant CAITHNESS for an Order, pursuant to 22 NYCRR § 130-1.1, imposing sanctions (in the form of litigation costs and attorney's fees) on Petitioners-Plaintiffs and their Counsel; and pursuant to CPLR 3211(a) (1),) (3), (4), (5) and (7), dismissing the Sixth Claim for Relief asserted in Petitioners-Plaintiffs' Petition-Complaint, which seeks declaratory relief under CPLR 3001 and related injunctive relief; is hereby denied in all respects.

Dated: Riverhead, New York
May 22, 2007

/s/ HON. JEFFREY ARLEN SPINNER
Hon. Jeffrey Arlen Spinner, J.S.C.

| ✓ Final Disposition | Non-Final Disposition |
|---|---|
| ✓ Scan | Do Not Scan |

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SUPREME COURT OF THE
STATE OF NEW YORK

IAS PART XXI - COUNTY OF SUFFOLK

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PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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INDEX NO. 2007-17956

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 07/11/07

MOTION SEQ. NO.: 002 - Mot D
ORIG. MOTION DATE: 07/18/07

MOTION SEQ. NO.: 003 - Mot D
ORIG. MOTION DATE: 07/25/07

MOTION SEQ. NO.: 004 - Mot D
ORIG. MOTION DATE: 07/25/07

FINAL SUBMIT DATE: 08/15/07

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC and SOUTH YAPHANK CIVIC ASSOCIATION,

*Petitioners-Plaintiffs,*

—against—

TOWN BOARD OF THE TOWN OF BROOKHAVEN; PLANNING BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

*Respondents-Defendants,*

—and—

LONG ISLAND POWER AUTHORITY,

*Additional Respondent-Defendant.*

(CPLR 1001[A])

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UPON the following papers numbered 1 to 337 read on these Motions:

- Petitioners-Plaintiffs' Order to Show Cause & Petition-Complaint (001) (Pages 1-104 & Exhibits 1-3, A-H & A-B);
- Respondent-Defendant CAITHNESS' Opposition (Pages 105-146 & Exhibits A-O);
- Respondent-Defendant BROOKHAVEN's Opposition (Pages 147-154);
- Respondent-Defendant LIPA's Opposition (Pages 155-169 & Exhibits A-C);
- Respondent-Defendant BROOKHAVEN's Answer (Pages 170-200 & Exhibits 1-3);
- Respondent-Defendant LIPA's Answer (Pages 201-240);
- Petitioners-Plaintiffs' Reply (Pages 241-275 & Exhibits A-I);

- Respondent-Defendant LIPA's Motion (002) (Pages 276-292);
- Respondent-Defendant BROOKHAVEN's motion (003) (Pages 293-298 & Exhibits A-D);
- Respondent-Defendant CAITHNESS' Motion (004) (Pages 299-337 & Exhibits A-J); it is,

ORDERED, that the application Petitioners-Plaintiffs (001) is hereby denied in all respects, the Petition-Complaint is hereby dismissed and the action disposed; and the applications of LIPA (002), BROOKHAVEN (003) & CAITHNESS (004) are hereby dismissed as moot, in light of this Court's decision regarding Petitioners-Plaintiffs' application herein.

Petitioners-Plaintiffs move this Court (001) for an Order and Judgment:

a. On the First Claim for Relief, pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD granted on June 5, 2007, pursuant to SEQRA (State Environmental Quality Review Act, ECL § 8-101, *et. seq*), by adopting a SEQRA Finding Statement for a proposed 350 megawatt electrical generating plant, to be constructed by Respondent-Defendant CAITHNESS, on an approximately 96 acre parcel located in the Hamlet of Yaphank. Town of Brookhaven, New York (the Caithness Project) (herein after the SEQRA Resolution);

b. Upon the Second Claim for Relief, pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD dated

June 5, 2007, which, *inter alia*, approved the Caithness Project and substantial variances and waivers from established zoning requirements (herein after the Zoning Resolution);

c. Upon the Third Claim for Relief, pursuant to CPLR Article 78, cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by Respondents-Defendants BROOKHAVEN TOWN BOARD and/or PLANNING BOARD for the purpose of authorizing and implementing the Caithness Project;

d. Upon the Fourth Claim for Relief, pursuant to CPLR 7805, staying enforcement of the SEQRA Resolution, and enjoining and restraining Respondents-Defendants CAITHNESS and LIPA from proceeding with any additional construction or development of the Caithness Project pursuant to the Resolutions challenged herein;

e. Upon the Fifth Claim for Relief/Cause of Action, pursuant to CPLR 3001, granting a judgment in favor of Petitioners-Plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness, and implementation of the SEQRA Resolution, the Zoning Resolution, and all other actions and authorizations granted by Respondents-Defendants BROOKHAVEN with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

f. Granting Petitioners-Plaintiffs the costs and disbursements of this proceeding.

Petitioners-Plaintiffs' above cited application by Order to Show Cause is filed upon their Petition-Complaint, which sets forth the above stated Claims for Relief, as follows:

1. The First Claim for Relief alleges Respondent-Defendant BROOKHAVEN TOWN BOARD violated the requirements of law and Decisions, because the environmental record before it was identical to that upon which it had previously refused to adopt identical SEQRA Findings on June 6, 2006, and upon which it purported to reverse its decision and approve the same SEQRA Findings on July 26, 2006, and again on June 5, 2007, therefore making their adoption of the SEQRA Resolution regarding the Caithness Project arbitrary, capricious and illegal, necessitating it be cancelled, annulled and declared of no force and effect, in that no change in the Caithness Project nor its environmental impacts were set forth, nor any other rationale for reaching a different result;

2. The Second Claim for Relief alleges that, by reason of the foregoing, Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the Zoning Resolution on June 5, 2007, which approved the Special Permit, Variances and Waivers for the Caithness Project, must also be cancelled, annulled, declared arbitrary and capricious and invalidated upon the same grounds;

3. The Third Claim for Relief alleges any Site Plan Resolution adopted by Respondent-Defendant BROOKHAVEN PLANNING BOARD granting approval for the Caithness Project must be annulled, declare arbitrary, capricious, unlawful,

void and of no further effect upon the same grounds;

4. The Fourth Claim for Relief alleges that, pursuant to CPLR 7805, the Court should stay further actions or substantial construction activities, enjoining Respondents-Defendants from conducting any further construction thereof:

5. The Fifth Claim for Relief alleges, by reason of the foregoing, a justiciable controversy has arisen, and currently exists, concerning the lawfulness of the SEQRA, Zoning and Site Plan Resolutions, and the procedures and proceedings upon which same are based, and therefore the Court should grant a Judgment, pursuant to CPLR 3001, as may be necessary in order to fully and fairly adjudicate all claims, controversies and disagreements of the parties concerning such Resolutions;

6. The Sixth Claim for Relief alleges to reserve Petitioners-Plaintiffs' full appellate rights to the Decisions, reasserting their prior claims in a prior action, herein, and seeking to have Respondents-Defendants BROOKHAVEN's 2007 Resolutions declared annulled.

Respondent-Defendant LIPA moves this Court (002) for an Order, pursuant to CPLR 3211(a)(1), (3) and (7), dismissing Petitioners-Plaintiffs' Fifth and Sixth Claims for Relief asserted in the Combined Article 78 Petition and Complaint in the above captioned action, on the grounds that Petitioners-Plaintiffs' claims are disproved by documentary evidence, they lack legal capacity to sue and the pleadings fail to state a cause of action.

Respondents-Defendants BROOKHAVEN move this Court (003) for an Order, pursuant to CPLR 3211(a)(1), (3) and (7), dismissing the Fifth and Sixth Claims for Relief contained in Petitioners-Plaintiffs' Combined Verified Petition and Complaint.

Respondent-Defendant CAITHNESS moves this Court (004) for an Order, pursuant to CPLR 3211(a)(1), (3) and (7), dismissing the Fifth Claim for Relief contained in Petitioners-Plaintiffs' Combined Verified Petition and Complaint dated June 12, 2007, dismissing the Sixth Claim for Relief therein to the extent it seeks declaratory or other relief apart from CPLR Article 78.

INCORPORATION OF RECORDS
OF PRIOR PROCEEDINGS:

For the purposes of clarity and information, ONLY, the Court hereby incorporates herein the full records of the two prior proceedings regarding this matter, under Suffolk County Index Numbers 2006-23201 and 2006-29596, including all submissions made and decisions rendered in said matters.

INTRODUCTION:

As in the last proceeding involving this matter, under Index Number 2006-23201, this is a "hybrid" action, seeking relief by way of a special proceeding pursuant to CPLR Article 78, as well as a declaratory judgment pursuant to CPLR Article 30, § 3001, and injunctive relief. Petitioners-Plaintiffs seek a review of the actions of Respondents-Defendants, most particularly Respondents-Defendants BROOKHAVEN.

Petitioners-Plaintiffs seek to have said review invalidate, declare unlawful, arbitrary and capricious, annul, void and in all respects render of no force and effect, the actions of Respondents-Defendants, culminating in adoption of two resolutions by Respondent-Defendant BROOKHAVEN TOWN BOARD on June 5, 2007, regarding approvals of a SEQRA determination and a special use permit for a 350 megawatt electric generating plant in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk and State of New York, known herein as the Caithness Project.

STATEMENT OF FACTS:

Respondent-Defendant LIPA selected Respondent-Defendant CAITHNESS to provide a state-of-the-art electric generating facility, which Respondent-Defendant CAITHNESS proposes to construct on a 15 acre portion of a 96 acre parcel, located as identified herein above, said land being zoned "L-1", light industry by Respondents-Defendants BROOKHAVEN prior to any action herein; said 15 acre portion being located within an Empire Development Zone, also established prior to any action taken herein.

Respondent-Defendant LIPA took on the status of "lead agency", pursuant to SEQRA (6 NYCRR § 617.2(u)], in order to perform a review of the potential environmental impacts of construction and operation of such a facility, prior to selection of the present site. After it was chosen, Respondents-Defendants BROOKHAVEN worked with Respondent-Defendant LIPA, as an "involved agency", to scope the Environmental Impact Statement, that

process being concluded on December 4, 2005, after which several of the Petitioners-Plaintiffs herein instituted the Nassau Action against several of the Respondents-Defendants herein, regarding said SEQRA process. That litigation did not, and could not, include Respondents-Defendants BROOKHAVEN. During that time, Respondents-Defendants LIPA and BROOKHAVEN began negotiating a Community Benefits Package which consisted principally of Payment-In-Lieu-Of-Taxes (PILOTs).

The L-1 zoning district of Respondents-Defendants BROOKHAVEN only permits electric generating facilities by the granting of a special permit by Respondent-Defendant BROOKHAVEN TOWN BOARD, subject to criteria set forth in various sections of the Town Code. Pursuant to § 85-31 of said Town Code, Respondent-Defendant CAITHNESS applied for such special permit, with requests for variances from certain requirements within that zoning district, including an exhaust stack height of 170 feet (exceeding the Town Code imposed limitation of 125 feet) and a building height of 80 feet (exceeding the Town Code imposed limitation of 50 feet).

On March 9, 2006 and April 25, 2006, public hearings regarding said application were held by Respondent-Defendant BROOKHAVEN TOWN BOARD, each allegedly lasting about five hours. Presentations were made by representatives of Respondents-Defendants LIPA and CAITHNESS, and testimony was taken in opposition (including several Petitioners-Plaintiffs herein) and in support. Further presentations, discussions and comments continued through several other meetings and work sessions of Respondent-Defendant BROOKHAVEN TOWN BOARD,

with resolutions approving the SEQRA determination and special permit being carried forward on said Respondent-Defendant's Agenda throughout this time period.

On June 6, 2006, with all the members of Respondent-Defendant BROOKHAVEN TOWN BOARD present, the resolution approving the SEQRA determination, as set forth in the FEIS adopted by Respondent-Defendant LIPA, was voted upon, with four members voting no, and three voting yes. On July 25, 2006, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a number of resolutions regarding the Caithness Project, including:

1. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, pursuant to Town Board Rules of Procedure, Article II, Section 3, Subsection A5, to waive the 90 day requirement before reintroduction of the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements: adopted by a vote of 5-2;

2. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, to accept the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements, which was adopted by a vote of 5-2 after a Motion to Table, by Councilman McCarrick, seconded by Councilwoman Bissonette: defeated by a vote of 2-5;

3. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to take out of order from the Decision Pending Agenda, the resolution to approve the special permit application

for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

4. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to approve the special permit application for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

Councilwoman Walsh, who moved the waiver of the 90 day rule and the reconsideration of the SEQRA resolution that had been previously defeated, had voted against approval of said resolution at the June 6, 2006 meeting of Respondent-Defendant BROOKHAVEN TOWN BOARD, and therefore having been on the prior prevailing side was a proper party to make said motions.

On September 25, 2006, the Planning Board of Respondent-Defendant BROOKHAVEN, premised upon the Special Permit approval of the Respondent-Defendant BROOKHAVEN TOWN BOARD, adopted a Resolution approving the Site Plan for the Caithness project, with numerous covenants and conditions to be met.

In August of 2006 Petitioners-Plaintiffs herein instituted their prior action (Index Number 2006-23201) against Respondents-Defendants herein, except Respondent-Defendant BROOKHAVEN PLANNING BOARD, against whom they filed a separate action in October, 2006 (Index Number 2006-29596). In rendering the decisions in those actions, this Court found that, absent a record rendering an explanation for its change of determination regarding the prior refusal to adopt the SEQRA Resolution, Respondent-Defendant BROOKHAVEN TOWN BOARD's subse-

quent July 25, 2006 adoption of a SEQRA Resolution identical to the one previously defeated on June 6, 2006, was arbitrary, capricious, unlawful, invalid and of no force or effect. This, in turn, invalidated Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the prior Special Permit Resolution in July 25, 2006, and the subsequent adoption by Respondent-Defendant BROOKHAVEN PLANNING BOARD, on September 25, 2006, of the prior Site Plan Resolution, as they were predicated on the July 25, 2006 invalid SEQRA Resolution.

After receipt of this Court's May 22, 2007 decisions in the prior proceedings, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a Resolution adopting a SEQRA Findings Statement (SEQRA Resolution) on June 5, 2007, which, unlike the July 25, 2006 SEQRA Resolution, included language setting forth its explanation for its determination on June 5, 2007, contrary to its prior determination on June 6, 2006. Thereafter, at the same meeting, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a new Special Permit Resolution, predicated upon their new SEQRA Resolution, and at a later date Respondent-Defendant BROOKHAVEN PLANNING BOARD passed a new Site Plan Resolution. Subsequently, Petitioners-Plaintiffs instituted this new hybrid action, as set forth herein above.

As this Court has repeatedly stated in prior decisions, it should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board *(see: Janiak v. Planning Board of the Town of Greenville*, 159 AD2d 574, 552 NYS2d 436 [2nd Dept], *appeal denied* 76 NY2d 707, 560 NYS2d 989,

561 NE2d 889 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896, 419 NYS2d 628 [2nd Dept 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see*, *Castle Properties Co. v. Ackerson*, 163 AD2d 785, 558 NYS2d 334 [3rd Dept 1990]).

THE NEW SEQRA RESOLUTION:

In regard to the First Claim for Relief in the instant Petition-Complaint, and subparagraph (a) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the Court recites herein several instances of specific language of the prior decision of May 22, 2007, under Index Number 2006-23201 (*East End Property v Town of Brookhaven*, 15 Misc3d 1138(A), 841 NYS2d 819, 2007 WL 1519037, 2007 NY Slip Op 51032 [2007]), that sets the parameters of said prior decision, concisely:

As regards the Fifth Claim for Relief in said prior action:

> "That leaves this Court confronted with the inescapable fact that the transcript submitted by Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD demonstrates that the SEQRA Resolution was brought up in the public session of the July 25, 2006 meeting, was properly reintroduced by a waiver of the Rules of Procedure, but then adopted with the same language, absent an explanation in the

SEQRA Resolution for the adoption (as opposed to the prior denial), and without any discussion on the record prior to said adoption. This does not meet the standards set forth clearly herein above, as promulgated by both the Appellate Division and Court of Appeals, and thus fails to meet the standard of literal compliance with both the letter and spirit of SEQRA.

Therefore, the Fifth Claim for Relief must be granted, solely to the extent that the adoption of the SEQRA Resolution by re-vote of Respondent-Defendant BROOKHAVEN TOWN BOARD, devoid of the requisite explanation for reaching the different result (passage as opposed to rejection), renders said action arbitrary and capricious, resulting in the declaration of said SEQRA Resolution null, void and of no force and effect. and requiring, pursuant to Article 78, that it be remanded to Respondent-Defendant BROOKHAVEN TOWN BOARD for proper action."

As regards the Sixth Claim for Relief in said prior action:

"The issues of SEQRA, generally, including the FEIS, were all disposed of by the decision rendered in the Nassau Action, as stated herein above. The issue of the Special Permit Resolution was disposed of by the decision herein above, to the extent of Petitioners-Plaintiffs standing to challenge same. The Nassau Action granted them standing to challenge the SEQRA procedures, while ruling against them on the specifics, but that same grant of standing

allowed them to challenge the instant and separate SEQRA actions of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, and the manner of adoption by Respondent-Defendant BROOKHAVEN TOWN BOARD of the SEQRA Resolution.

The odd manifestation of the situation at hand is that, although lacking standing to challenge the Special Permit Resolution, as determined herein above, their success in challenging the manner of adoption of the SEQRA Resolution, as determined pursuant to the immediately prior Claim for Relief, serves to annul the Special Permit Resolution, as it cannot stand without a properly adopted SEQRA Resolution.

Furthermore, in the related action against Respondent-Defendant BROOKHAVEN's Planning Board, while Petitioners-Plaintiffs lack standing to challenge same pursuant to their failure to demonstrate they are within the zone of interest or suffer injury different from the general public, their right to challenge pursuant to SEQRA, and the resultant nullification of Respondent-Defendant BROOKHAVEN TOWN BOARD's action, deprives the Planning Board of the ability to take action to approve the site plan, for lack of a properly adopted Special Permit, and therefore renders the actions of Respondent-Defendant BROOKHAVEN's Planning Board a nullity, void and of no force and effect."

Furthermore, this Court was very clear in said prior decision as to the scope of action necessary to cor-

rect the prior error, and the record, regarding this matter, setting forth the following language therein:

> "This Court further notes that compliance with these requirements is not onerous. It is further well settled that the Courts in New York have accorded great deference to the explanations offered by boards for their contrary determinations under similar circumstances, as well as to changes in policy (*See, Hawryluk v Zoning Board of Appeals of the Town of Huntington*, 173 AD2d 826, 571 NYS2d 53 [2 Dept 1991]; *Ciampa v Hudson*, 158 AD2d 925, 551 NYS2d 89 [4 Dept 1990]; *Pesek v Hitchock*, 156 AD2d 690, 549 NYS2d 164 [2 Dept 1989); *Knight v Amelkin, supra)*. The Appellate Division, Second Department, recently confirmed that the Courts will generally defer to the explanation for reaching a different result on similar facts, sustaining the determination because a rational explanation for reaching the different result on similar facts was provided (*See, Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2 Dept 2006], citing *Knight v Amelkin, supra*)."

In rendering this decision, this Court will defer to the explanation of Respondents-Defendants BROOKHAVEN for reaching a different result, sustaining its determination because a rational explanation for reaching the different result was provided. As noted above, New York Courts accord great deference to the explanations offered by boards for their contrary determinations under similar circumstances, and this Court finds that Respondents-Defendants have adequately met that standard.

Therefore, the First Request for Relief must be dismissed.

THE NEW ZONING RESOLUTION:

In regard to the Second Claim for Relief in the instant Petition-Complaint, and subparagraph (b) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the Court notes that in the May 22, 2007 prior ruling (*East End Property v Town of Brookhaven*, 15 Misc 3d 1138(A), 841 NYS2d 819, 2007 WL 1519037, 2007 NY Slip Op 51032 [2007]), it was clearly set forth that Petitioners-Plaintiffs has no standing to challenge the Zoning Resolution therein, as stated in the following language of said decision:

> "In order to demonstrate standing, Petitioners-Plaintiffs must show that they will suffer a harm that is in some manner different than the harm, the public may generally suffer, and that their alleged injuries fall within the zone of interest sought to be promoted or protected by the statute under which the municipality acted (*See, Society of Plastics Industry v County of Suffolk, supra; Redilker v Zoning Board of Appeals of the Town of Philipstown*, 280 AD2d 548, 721 NYS2d 77 [2 Dept 2001]; *Long Island Business Aviation Association, Inc v* Town *of Babylon*, 29 AD2d 794, 815 NYS2d 217 [2 Dept 2006]). The Courts have ruled that petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property (*See, Olish v Heaney*,

> 2003 WL 21276342 [NY SupCt]; *Concerned Citizens for Open Space v City of White Plains*, 2003 WL 22283389 [NY SupCt]; *Oates v Village of Watkins Glen*, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed WalMart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance (*See, Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 414, 515 NYS2d418, 508 NE2d 130 [1987]). Petitioners-Plaintiffs herein, none of whom live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code, do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large, and therefore lack standing to challenge Resolution I adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD regarding approval of the Special Permit, specifically."

Petitioners-Plaintiffs prevailed in invalidating the Zoning Resolution in the prior action only because the SEQRA Resolution upon which it was predicated was a nullity. The SEQRA Resolution herein is valid as set forth herein above, and therefore Petitioners-Plaintiffs lack both standing or the 'odd manifestation' they benefitted from last time, in order to prevail herein.

Therefore, the Second Request for Relief must be dismissed.

THE NEW SITE PLAN RESOLUTION:

In regard to the Third Claim for Relief in the instant Petition-Complaint, and subparagraph (c) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the Court reiterates that stated herein above, dispositive of the Second Claim for Relief and subparagraph (b) of the relief requested in the Order to Show Cause, as, for the same reasons, Petitioners-Plaintiffs lack both standing or the 'odd manifestation' they benefitted from last time, in order to prevail herein.

Therefore, the Third Request for Relief must be dismissed.

INJUNCTIVE RELIEF:

In regard to the Fourth Claim for Relief in the instant Petition-Complaint, and subparagraph (d) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the first three Requests for Relief having been dismissed, there remain no grounds upon which to grant injunctive relief.

Therefore, the Fourth Request for Relief must be dismissed.

DECLARATORY JUDGMENT:

In regard to the Fifth Claim for Relief in the instant Petition-Complaint, and subparagraph (e) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, no justiciable controversy haven arisen, and none currently existing, con-

cerning the lawfulness of the SEQRA, Zoning and Site Plan Resolutions, and the procedures and proceedings upon which same are based, the Court cannot grant a Judgment, pursuant to CPLR 3001, since none is necessary in order to fully and fairly adjudicate all claims, controversies and disagreements of the parties concerning such Resolutions.

Therefore, the Fifth Request for Relief must be dismissed.

RESERVATION OF APPELLATE RIGHTS:

In regard to the Sixth Claim for Relief in the instant Petition-Complaint, the Court knows of no right to reserve appellate rights, as same is statutory, with strict time limitations that must be observed, this Court lacking the authority to grant relief therefrom.

Therefore, the Sixth Request for Relief must he dismissed.

COSTS AND DISBURSEMENTS:

In regard to subparagraph (f) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, said parties having failed to prevail, this is no legitimate claim for costs and reimbursements.

Therefore, the request for costs and disbursements must be dismissed.

RESPONDENTS-DEFENDANTS' MOTIONS:

Respondents-Defendants having brought Motions (002), (003) and (004) to dismiss the Fifth and Sixth Requests for Relief, and same having been dismissed herein above, based on their own lack of sustainability, said Motions are moot, and require no further analysis.

Therefore, Respondents-Defendants' Motions must be dismissed.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that Petitioners-Plaintiffs' Combined Petition-Complaint and Order to Show Cause (001) are hereby denied in all respects, and this action is hereby disposed; and it is further

ORDERED, that Respondents-Defendants Motions (002), (003) and (004) are hereby dismissed as moot.

Dated: Riverhead, New York
January 2, 2008

HON. JEFFREY ARLEN SPINNER, J.S.C.

| ✓ Final Disposition | Non-Final Disposition |
|---|---|
| ✓ Scan | Do Not Scan |

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